Court, U.S.
FILED

03 404 SEP 9 2003

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No. 03-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2003

JEROME JARRETT,
Petitioner,

vs.

TOWN OF YARMOUTH, ROBERT CHAPMAN, and
PETER McCLELLAND,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where some of the *Graham v. Connor*, 490 U.S. 386, 396 (1989) factors supported the jury's finding of a constitutional violation, may a court nevertheless reject the jury's verdict on grounds that the officer used force in accordance with a police department policy allegedly widely followed by many agencies?

2. Is the fact that an officer used force in accordance with his department's policy a factor that justifies the use of force as constitutionally reasonable under the Fourth Amendment?

3. In deciding whether sufficient evidence supported the jury's finding that a police dog attack was the use of unreasonable force, may a court ignore evidence that the dog attack created a substantial risk of causing serious injury and that the dog attack violated generally accepted police standards for police use of force?

4. Where a plaintiff alleges he was subjected to excessive force when attacked by a police dog, is the issue of whether the police dog attack constituted "deadly force" a legal issue for the court, or a factual question for the jury?

LIST OF PARTIES

Petitioner Jerome Jarrett was plaintiff and respondent in the courts below. Respondents Town of Yarmouth, Robert Chapman, and Peter McClelland were defendants and appellants in the courts below. Defendants Gerard Britt, Cheryl Nugent Gomsey, and Richard White were defendants in the trial court; there is no record of the disposition of the claims against them.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The Facts. 3

B. The District Court Proceedings. 8

A. The Court of Appeals' Decisions. 9

The First Decision 9

The Second Decision 9

REASONS FOR GRANTING WRIT 11

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG THE CIRCUITS. 11

II. REVIEW IS NECESSARY TO DETERMINE WHETHER *TENNESSEE V. GARNER* IS LIMITED TO FIREARMS. 12

III. REVIEW IS NECESSARY TO DETERMINE WHEN MAY A COURT OVERTURN A JURY'S RESOLUTION OF THE *GRAHAM* FACTORS. 15

IV. REVIEW IS NECESSARY TO DETERMINE WHETHER FOLLOWING DEPARTMENT POLICY MAY JUSTIFY AN OFFICER'S USE OF FORCE. 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

Chew v. Gates,
27 F.3d 1432 (9th Cir. 1994) 11, 15

Estate of Phillips v. City of Milwaukee,
123 F.3d 586 (7th Cir. 1997) 13, 15

Graham v. Connor,
490 U.S. 386 (1989) ..... i, 10, 12

Gutierrez v. City of San Antonio,
139 F.3d 441 (5th Cir. 1998) 13

Marley v. Allentown,
774 F. Supp. 343 (E.D. Penn. 1991) 11, 13, 15

Mathis v. Parks,
741 F. Supp. 567 (E.D.N.C. 1990) 13

Mathis v. Schnarr,
547 F.2d 1007 (8th Cir. 1975) 13

Matthews v. Jones,
35 F.3d 1046 (6th Cir. 1994) 13, 14

Michael v. State,
160 Ga. App. 48, 286 S.E.2d 314 (1981) 14

People v. Nealis,
232 Cal. App. 3d Supp 1, 283 Cal. Rptr. 376 (1991) .. 14

Pruitt v. City of Montgomery,
771 F.2d 1475 (11th Cir. 1985) 13

Robinette v. Barnes,
854 F.2d 909 (6th Cir. 1988) 9, 11, 13, 14

Ryder v. City of Topeka,
814 F.2d 1412 (10th Cir. 1987) 13

State v. Bowers,
239 Kan. 417, 721 P.2d 268 (1986) 14

State v. Sinks,
168 Wis.2d 245, 483 N.W.2d 286 (Wis. Ct. App. 1992) 14

Tennessee v. Garner,
471 U.S. 1 (1985) 12, 14, 18

Vathekan v. Prince George's County,
154 F.3d 173 (4th Cir. 1998) 11

Vera Cruz v. City of Escondido,
139 F.3d 659 (9th Cir. 1997) 9, 13

Vizbaras v. Prieber,
761 F.2d 1013 (4th Cir. 1985) 16

Wilson v. Layne,
526 U.S. 603 (1999) 16, 17

Constitution/Statutes

Title 42, United States Code § 1983 ..... 2, 8

U.S. Const., Amend. IV 2, 9, 11, 12, 15-18

Other Authorities

Intentional Association of Chiefs of Police,
Model Policy for the Use of Force 14

W. GELLER & M. SCOTT, DEADLY FORCE:
WHAT WE KNOW (1992) 14

Appendix

Appendix A–Court of Appeal Opinion filed May 6, 2003
Appendix B–Court of Appeal Opinion filed October 25, 2002
Appendix C–Court of Appeal Order filed June 12, 2003, denying rehearing and rehearing *en banc*
Appendix D–District Court Judgment

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2003

JEROME JARRETT,
Petitioner,

vs.

TOWN OF YARMOUTH, ROBERT CHAPMAN, and
PETER McCLELLAND,
Respondents.

Petitioner Jerome Jarrett respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit filed May 6, 2003.

OPINION BELOW

The opinion of the Court of Appeals is reported at 331 F.3d 140 (1st Cir. 2003). It appears in the Appendix [hereinafter "Apx."] as Appendix A. An earlier opinion, withdrawn on petitioner's rehearing petition, is reported at 309 F.3d 54 (1st Cir. 2002). It appears in the Appendix as Apx. B. No opinion was rendered by the District Court for the District of Massachusetts; its judgment appears as Appendix D.

JURISDICTION

The Court of Appeals' judgment was filed on May 6, 2003. Apx. A1. That court denied a timely petition for rehearing and suggestion for rehearing *en banc* June 12, 2003. Apx. C1. This petition for certiorari was filed within 90 days of June 12, 2003. This

Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. The Facts.

In the early morning of December 16, 1994, Yarmouth police officers saw Mr. Jarrett commit minor traffic violations as he drove home. Before the officers could initiate a traffic stop,[1] Mr. Jarrett drove his car into a parking lot where his car collided with a cement post. Aware of the police presence, Mr. Jarrett got out and ran. More officers arrived, including defendant McClelland, a Yarmouth police dog handler, along with his police dog. After giving several warnings, McClelland released the dog knowing the dog would probably attack Mr. Jarrett should it find him. Apx. A4-A5. Regarding the dog attack on Mr. Jarrett, the testimony differed. Mr. Jarrett testified he stopped running when he heard the warning about a dog, putting his hands in the air. Nevertheless, the dog attacked him, and bit him again in apparent response to someone's commands. McClelland, on the other hand, claimed Mr. Jarrett continued to run after the officer's last warning, and that after McClelland released the dog both it and Mr. Jarrett disappeared from McClelland's view. Per McClelland, the dog attacked Mr. Jarrett during the 30 seconds both were out of McClelland's sight. Upon seeing both, McClelland recalled the dog. Apx. A4, A5-A6.

As *if* plaintiff contended that Yarmouth should have trained its dogs in "circle and bark" rather than "bite and hold,"[2] the court of

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[1] An officer claimed he attempted a traffic stop by turning on his lights and signaling for Mr. Jarrett to stop. However, Mr. Jarrett denied any officer signaled him or tried to stop him. Apx. A4. For purposes of review, Mr. Jarrett's version controls.

[2] Plaintiff's theory was *not* that the Yarmouth dog should have been trained in "circle and bark"; it was that the dog attack was an unjustified use of physical force under generally accepted law enforcement *use of force* standards, including the deadly force standard. RT 727-28. The "circle and bark" training the lower court refers to came out in the most unlikely locale for plaintiff's theory of the case –

appeals discussed the two training methods, concluding that Yarmouth's training reflects that followed by the "vast majority" of police agencies in this country. Apx. A4-A5.

The panel's factual recital is incorrect and misleading in two respects. First, the panel notes that officer White had thought plaintiff was wanted in an armed robbery. Apx. A4, A18. While this is correct it was irrelevant. The only officer who used force against Mr. Jarrett, defendant McClelland the dog handler, did *not* believe that Mr. Jarrett was wanted for armed robbery. RT 640-41 (McClelland knew that Jarrett had already been arrested and charged for the robbery); RT 395 (Per McClelland, before releasing the dog the only crimes for which Mr. Jarrett was wanted were the motor vehicles violations that allegedly occurred night of his arrest); RT 457 (trial court states that earlier armed robbery arrest relevant only to show that the officers "recognized him.").

The panel also claims that Yarmouth policy limits deadly force to firearms. While that is true as to the *written* Yarmouth policy (as the panel correctly notes, Apx. A12 n.4), the panel omits mentioning that Yarmouth officers were also trained that "[f]orce likely to cause death or serious bodily injury" was deadly. RT 997 (testimony of Yarmouth police chief Chapman).

Not discussed or even acknowledged by the court of appeals was plaintiff's evidence – it was only the main trust of his case -- that by attacking and biting Mr. Jarrett the dog attack violated generally accepted law enforcement standards governing the use of physical force against suspects. Under that law enforcement standard, *all* police weapons, including dogs, are restricted in their use based on the likelihood or risk of serious injury or death the weapon presents. RT 727 (plaintiff's expert); RT 604 (defense

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defendants' cross-examination of plaintiff's police dog expert. RT 786.

expert). The greater the risk of serious injury from a particular weapon, the more severe the restrictions on that weapon's use. RT 727-28. If a weapon creates a substantial risk of causing serious injury, it may *not* be used unless the suspect presents an immediate and credible risk of death or serious injury. RT 730 (plaintiff's expert); RT 605 (defense expert).

Because a police dog is more likely to cause serious injury than a police baton strike and is likely to cause serious injury, plaintiff's expert placed a dog *above* a baton on the police use of force ranking. RT 728-30. Consequently, a dog should not bite unless the suspect presents a life threatening risk. RT 760, 764, 778. Per the defense expert, a police dog attack is ***not*** likely to cause serious injury; a police dog attack is about on par with a baton strike in terms of probable injuries. RT 606-07. Consequently, per the defense, the dog attack on Mr. Jarrett was a justified use of force under the police use of force standards. RT 590-91.

To prove his position on the risk of serious injury from a police dog attack, plaintiff called Dr. Peter Meade, a trauma surgeon. Dr. Meade conducted a comprehensive study of over 600 persons, treated at 36 different hospitals, who were bitten by "bite and hold" trained police dogs. RT 499-501, 505-06. For persons bitten by police dogs, the in-patient hospitalization rate was 41 percent, with an average stay of four days; 75% of bite victims had multiple bites (meaning to two or more different parts of the body), RT 506. Police dog bite victims often had vascular injuries comparable in many ways to those inflicted as a result of gunshot or knife, RT 506-08. Injuries from police dog attacks were generally far more severe than injuries from ordinary dog attacks, even though police dog bite victims were better able, because of their age and sex (mainly young adult males) to defend themselves than the small children and the elderly, the persons usually sustaining serious injuries in ordinary dog attacks. RT 509-11. And because a police dog is trained to bite

hard, a police dog bite was more likely to destroy blood vessels and surrounding tissue, thereby increasing the risk of infection. RT 513. Dr. Meade thus concluded that Mr. Jarrett faced a substantial risk of serious injury and even possibly death when the dog was allowed to bite him. RT 514-15.

Defendants called no medical expert. Nor did they other any other evidence refuting Dr. Meade's testimony.

Also not mentioned by the court of appeal was defendant Chapman's testimony, offered in the trial's second phase when called to the stand by plaintiff, indicating that Chapman had been deliberately indifferent in his supervision and management of Yarmouth's dog handlers. Officers, including dog handlers, must be held accountable for their actions. Maintaining discipline and holding officers accountable was among Chapman's major responsibilities. RT 979-80. Chapman had to insure that his subordinates knew what was and what was not permissible under department policy. RT 980. Chapman knew that when officers lack discipline and are not held accountable, constitutional violations occur. Moreover, Chapman knew that a breakdown in discipline and accountability is a leadership problem. RT 981.

Chapman acknowledge that a Yarmouth officer's force options are ranked according to probability of injury, including the probability of serious injury. RT 990. Pursuant to the use of force policy Yarmouth officers received training and instructions limiting the circumstances under which they could use a firearm, a baton, pepper spray, or a chemical substance. RT 999-1001, 1002-04. Officers can not use any type of chemical substance if resistance is minor or non-hazardous to the officer. RT 1003-04. An officer can use a baton in defense of self or others, only if necessary to subdue a person violently resisting arrest, or to deter persons who are violently engaged in riotous behavior. RT 1000.

Chapman admitted that using a dog to bite is suppose to be subject to Yarmouth's use of force rules. RT 989. But Chapman stated there is no written policy or training that informed Yarmouth officers on the circumstances under which a dog could bite. RT 992-93. Per Chapman, the use of force policy did *not* address or limit the circumstances when a dog could be used to attack and bite. RT 993-93, 1010. Chapman never promulgated any rules or regulations whatsoever concerning the use of dogs as an instrumentality of force. RT 1004. Consequently, under Chapman's tenure it was completely discretionary for officers as to *when* they could use dogs to bite. Rt 1007. Or as Chapman conceded, during his 16 years he "allowed, condoned, encouraged the unbridled discretion of street cops to make judgments as to when they can unleash and use dogs to attack and bite." RT 1008. So despite his responsibilities for holding subordinates accountable, Chapman acknowledged he "did nothing but put [his] stamp of approval on the fact that [his department] had K9 dogs and took it for granted that it was an okay thing for 16 years." RT 987-88.

As chief, Chapman knew he had to be aware of how officers' conduct actually comported with department standards. RT 980-81. He thus asserted he had his "thumb" on the situation the whole time. RT 974; *see also* RT 971 (Chapman claimed that he discussed with investigator the results of every internal affairs complaint and investigation). Yet during his 16 years as chief and in reviewing at least 16 misconduct complaints, there was not a single sustained complaint of officer misconduct. RT 971-73.

Chapman knew that before a competent police manager allows his subordinates to use a weapon, the manager must understand the likely injuries the weapon will inflict. RT 986. A manager should, per Chapman, consult authoritative sources on the probable injuries. RT 987. Despite this awareness and his knowledge that handlers used dogs to bite, and even though he knew

the dogs were capable of causing serious injury, RT 982-83, Yarmouth never performed any studies on the injuries the dogs inflicted. Nor did Chapman seek or obtain from any source information on the probability of serious injuries from police dog attacks. RT 982-983. Chapman was even unaware that such information exists. RT 983.

Chapman also admitted, via his deposition testimony read to the jury, that he was unaware if Yarmouth dog handlers had ever received training on the constitutional limits of using dogs to attack and bite. RT 1013-14.

B. The District Court Proceedings.

Mr. Jarrett sued in district court under 42 U.S.C. § 1983, claiming he was subjected to excessive force during the course of his December 16, 1994 arrest. Defendants were the city, Yarmouth Police Chief Robert Chapman, Yarmouth police officers Gerard Britt, Cheryl Nugent Gomsey, Richard White, and Peter McClelland. Mr. Jarrett claimed the Yarmouth police dog attack was excessive and a use of unjustified deadly force.

The trial court bifurcated the claims for trial. In the first phase the jury heard the claim against the dog handler, McClelland, and found that he used excessive force but awarding only $1.00 in nominal damages. As against McClelland, the jury declined to award any punitive damages. In the second phase, the jury determined the liability of the municipal defendant Yarmouth and its police chief, defendant Chapman. The jury found that McClelland used force in accordance with Yarmouth policy, that police chief Chapman "permitted and tolerated a pattern and practice of unjustified, unreasonable and excessive force by Officer McClelland with respect to the latter's deployment of Shadow," and awarded $50,000 in punitive damages against Chapman in his individual

capacity. Apx. A6-A7, A10.

A. The Court of Appeals' Decisions.

The First Decision

In its initial decision the court of appeals reversed the judgment on qualified immunity grounds, believing (incorrectly) that the only defendants who had appealed were McClelland and Chapman. The court first concluded that the jury must have credited McClelland's account of the dog attack and not Mr. Jarrett's. Apx. B9-B13. Then while assuming there was evidence supporting the jury's finding that the dog attack was excessive, Apx. B14, B12 & n.12, the court found the individual defendants entitled to qualified immunity because (a) as a matter of law a police cannot qualify as deadly force, and (b) the "bite and hold" training has not been declared unconstitutional by any court. Apx. B16-B21.

The Second Decision

Implictly acknowleging an error, on Mr. Jarrett's rehearing petition the court vacated its first decision and issued a second. The court now acknowledged that plaintiff had tried his claim against Yarmouth, and treated the judgment against Chapman and Yarmouth as including a judgment against Yarmouth. Apx. A2 n.2, A7, A9-A10. The court again concluded that the jury must have credited McClelland's account of the dog attack. Apx. A11-A14. This time, though, the court found that as a matter of law the dog attack could not have violate the Fourth Amendment. As matter of law the dog attack could not have constituted deadly force. Apx. A15-16. In so concluding and despite citing two of the relevant cases, *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) and *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1997), the court offered no discussion of, or took a position on, the two competing definitions of

"deadly force," or whether plaintiff's even satisfied either definition. Furthermore, the court concluded, the widespread training of police dogs under "bite and hold" means that the dog attack on Mr. Jarrett, given that the dog was used as it was trained, could not have violated the non-lethal force standard of *Graham v. Connor*, 490 U.S. 386 (1989). Apx. A17-A19.

REASONS FOR GRANTING WRIT

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG THE CIRCUITS.

In a published the decision the First Circuit has determined that a police dog attack pursuant to a municipal policy of "bite and hold" cannot constitute excessive force, at least where the person bitten is suspected of some criminal act. This conclusion contradicts that reached by the Ninth Circuit in *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), and the Third Circuit in *Marley v. Allentown*, 774 F. Supp. 343 (E.D. Penn. 1991), *aff'd* 961 F.2d 1567 (3d Cir. 1991). In *Chew*, the Ninth Circuit found that allowing a "bite and hold" police dog to attack a hiding felony suspect may violate the Fourth Amendment for which the city would be liable. 27 F.3d at 1441-45. In *Marley*, the Third Circuit affirmed (without opinion) the jury's verdict holding an officer liable for letting his dog attack and bite a fleeing misdemeanor suspect.

Simply put, do officers escape Fourth Amendment scrutiny because they let a dog inflict the injury pursuant to a department policy of "bite and hold"? According to the First and Sixth Circuit (*Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) ("bite and hold" police dog kills non-dangerous felony suspect; *held* justified)), they do. But *not* according to the Ninth and (presumably) Third Circuits. In the First and Sixth Circuits, what will it take to get judicial review of a severe and mutilating injury inflicted by a police dog pursuant to police department policy? A dog "crushing [the] skull" of an innocent homeowner? Apx. B17 (*citing Vathekan v. Prince George's County*, 154 F.3d 173 (4th Cir. 1998)).

If it is going to be the law that officers can do through dog attacks what they cannot do themselves, then this Court should say so. On the other hand, if Mr. Jarrett is entitled to the premise of such

decisions as *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), *i.e.*, even those suspected of crime have a right not to be subjected to unreasonable force, then this Court should grant review. The nation needs to know whether special Fourth Amendment rules apply to officers who use dogs as their instrumentality of force.

If, as counsel believes, the First Circuit was wrong, the decision will encourage needless mutilations and maiming before an enlightened court remedies the error. If (God forbid) the First Circuit was right, then those who need to know should be told. It'll help clear the courts' dockets. The injured won't waste time filing lawsuits on the premise that the Fourth Amendment applies to all.

II. REVIEW IS NECESSARY TO DETERMINE WHETHER *TENNESSEE V. GARNER* IS LIMITED TO FIREARMS.

In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court placed limits on the police use of "deadly force" holding that such force could be constitutionally employed only to "seize" felons who the officer had probable cause to believe presented a significant of death or serious injury to the officer or others. 471 U.S. at 3. This Court did not define "deadly force" in *Garner* because it had no need to. The force used in that case, a gunshot, was obviously deadly.

Here, key to the panel's decision was its conclusion that the police dog attack at issue could not have constituted "deadly force" within the meaning of *Tennessee v. Garner*. Apx. A15-16. The panel did not analyze any of plaintiff's evidence showing the risk of death or serious injury the police dog attack presented; instead, as if it was a pure question of law the panel cited cases from the Ninth and Sixth Circuits where those courts, using different definitions of deadly force to analyze the facts before them, found the dog attacks

to be non-deadly. *Robinette v. Barnes*, 854 F.2d 909, 912-13 (6th Cir. 1988); *Vera Cruz v. City of Escondido*, 139 F.3d 659, 662-63 (9th Cir. 1997).

It is time for this Court to define what it meant by "deadly force" in *Garner*, and whether once defined the question is one of fact or law. The Circuits are in conflict. Of the eight to have passed on the question, most follow the Model Penal Code ("MPC") or its equivalent – force that creates a substantial risk of death *or* serious injury is deadly. *Mathis v. Schnarr*, 547 F.2d 1007, 1009 n.2 (8th Cir. 1975) (*en banc*), *vacated as moot sub nom*, *Ashcorft v. Mathis*, 431 U.S. 171 (1977); *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479-80 n.10 (11th Cir. 1985); *Ryder v. City of Topeka*, 814 F.2d 1412, 1416-1417 & n.11 (10th Cir. 1987); *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 593 (7th Cir. 1997); *Marley v. City of Allentown*, 774 F. Supp. 343, 346 (E.D. Pa. 1991), *aff'd without opinion*, 961 F.2d 1567 (3d Cir. 1991); *Mathis v. Parks*, 741 F. Supp. 567, 572 & n.3 (E.D.N.C. 1990); *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998).

Unlike the other circuits, the Ninth Circuit has adopted a much more restrictive definition, concluding that it is only force that is more likely than not to *kill* is "deadly"; force likely to cause serious injury not rising to a probability of death, is *not* deadly. *Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1997).

The issue of deadly force as applied to non-firearms is important. In its decision the First Circuit accelerates that begun in *Matthews v. Jones*, 35 F.3d 1046, 1051 (6th Cir. 1994). There, the Sixth Circuit held, without any discussion on whether evidence showed that the police dog as used created a risk of death or serious injury, that the police dog attack could not be deadly. By their analytical approach these cases are saying it is irrelevant that a

plaintiff like Mr. Jarrett can and does show that the dog was likely to cause death or serious injury, e.g., *Robinette*, 854 F.2d at 912 (plaintiff offered no evidence that police dog was likely to death or serious injury; hence, dog attack was not deadly force). What matters is that no court has said a dog attack is deadly. Apx. A15-16.[3]

The First Circuit's decision threatens the well-accepted law enforcement approach towards classifying police weapons. Law enforcement defines deadly force as *any* force likely to cause death or serious injury. "There is general agreement [among police agencies] that the term [deadly force] means force reasonably capable of causing death or great bodily harm." W. GELLER & M. SCOTT, DEADLY FORCE: WHAT WE KNOW, 23 (Police Executive Research Forum 1992). *See also* the Intentional Association of Chiefs of Police ("IACP"), Model Policy for the Use of Force, deadly and non-deadly (defines "deadly force" as "[a]ny use of force that is likely to cause death or serious bodily harm). Notwithstanding its written policy (Apx. A12 n.4) *Yarmouth* does not limit deadly force to firearms. See page 4, *supra* (Chief Chapman testified that "[f]orce likely to cause death or serious bodily injury" was deadly under Yarmouth police department policy.).

But the instant case and *Matthews* tell law enforcement to abandon its reasonable methodology of assessing the risk of serious injury or death for deciding when *Garner* applies. Instead, the cases say *Garner* is limited to firearms; hence, the non-firearm weapon the

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[3] At least where it is a person charged criminally, courts have not hesitated to find that using a dog to attack or threaten injury is "deadly." *E.g., People v. Nealis*, 232 Cal. App. 3d Supp 1, 6, 283 Cal. Rptr. 376, 379 (1991); *State v. Sinks*, 168 Wis.2d 245, 289-90, 483 N.W.2d 286 (Wis. Ct. App. 1992); *State v. Bowers*, 239 Kan. 417, 721 P.2d 268, 273-275 (1986); *Michael v. State*, 160 Ga. App. 48, 286 S.E.2d 314 (1981).

police know or should know qualifies as deadly, is not. At least not until an appellate court says so.

III. REVIEW IS NECESSARY TO DETERMINE WHEN MAY A COURT OVERTURN A JURY'S RESOLUTION OF THE *GRAHAM* FACTORS.

In *Graham v. Connor*, 490 U.S. 386, 396 (1989), this Court pointed to three factors for assessing reasonableness: severity of crime at issue; whether suspect poses an immediate threat; and whether suspect is actively resisting or attempt to evade by flight. The issue here is under what circumstances may a reviewing court disturb the jury's resolution of these factors. The panel below embarked on a *de novo* review, characterizing all three factors as running in defendants' favor. In the process the panel disregarded plaintiff's evidence showing that the dog attack violated well-established police use of force standards.

A reviewing court, plaintiff submits, is not free to re-weigh evidence on the application of the *Graham* factors. It denies the aggrieved plaintiff his Seventh Amendment right to trial by jury. Even limited to the evidence the panel acknowledged, the jury had ample basis for concluding that the dog attack was unreasonable. Mr. Jarrett was want for minor, non-dangerous traffic offenses. He was not threatening anyone with injury. Mr. Jarrett was on foot, having abandoned his car. As another circuit found, the absence of an immediate threat to anyone's safety is alone a basis for finding a constitutional violation. *Chew*, 27 F.3d at 1442 (jury may find that police dog attack on hiding felony suspect was not justified). *See also Marley v. City of Allentown*, *supra* (police dog attack on fleeing misdemeanor suspect held unjustified under the Fourth Amendment).

IV. REVIEW IS NECESSARY TO DETERMINE WHETHER FOLLOWING DEPARTMENT POLICY MAY JUSTIFY AN OFFICER'S USE OF FORCE.

The probable driving force for the panel's conclusion that the dog attack was constitutionally reasonable was the panel's belief that most departments use "bite and hold," and the dog handler McClelland followed that policy. See Apx. A17; Apx. B16-B17. But is it the law that a constitutional violation may not be found when the officer religiously abides by department policy in using force in a non-malicious setting? This panel appears to say yes – note the panel's reliance on the claim that the "bite and hold" policy is followed by the "vast majority" of police departments, Apx. A4-A5, and has not been found "unconstitutional" by any court, Apx. A17.

This Court should grant review to determine the role department policy plays in determining a constitutional violation. There is little guidance and less agreement about what role official policy and practice plays in determining whether an officer's conduct was reasonable under the Fourth Amendment. In *Vizbaras v. Prieber*, 761 F.2d 1013 (4th Cir. 1985), a divided court approved an instruction on qualified immunity that allowed consideration of obedience to department policy in determining defendants' subjective good faith belief that their conduct was lawful, while the dissent would have found that "standard police department operating procedures was admissible, but only as a guide to the jury as to what is reasonable under given circumstances, and not to establish defendants' good faith." 761 F.2d at 1019, n.4.

This Court's decision in *Wilson v. Layne*, 526 U.S. 603 (1999), suggested that an officer's reliance on department policy may entitle him to qualified immunity, but did not make an

otherwise unreasonable search constitutionally reasonable:

> Finally, important to our conclusion was the reliance by the United States marshals in this case on a Marshal's Service ride-along policy which explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests. The Montgomery County Sheriff's Department also at this time had a ride-along program that did not expressly prohibit media entry into private homes. . . . Such a policy, of course, could not make reasonable a belief that was contrary to a decided body of case law. But here the state of the law as to third parties accompanying pol,.ice on home entries was at best undeveloped, and it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies.

562 U.S. at 617.

Since police departments are paramilitary organizations in which police officers are expected to act in accordance with training, it is reasonable to give an officer qualified immunity for following his training (at least where the conduct is not malicious). But the panel here took it a step further, finding no constitutional violation because McClelland followed a widely practiced police policy. The panel has diluted the Fourth Amendment's "objectiveness reasonableness." Instead of determining whether a seizure was objectively reasonable under the Fourth Amendment, the question is whether the particular officer followed a generally accepted police practice.

Under the "objective reasonableness" standard, the Fourth Amendment should afford the same protections in Alabama and Arizona, Boyle Heights and Brentwood, regardless of the good or bad training an individual officer has received. This Court's determination that only "objectively" reasonable force may be used requires the utilization of standards independent of the training of a particular officer and the policies and practices of a particular unit or department. For example, that an officer has been instructed to shoot all fleeing felons, regardless of risk, is *not* a factor that establishes the shooting was "objectively reasonable." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). (Tennessee statute authorized officer to shoot plaintiff's decedent; *held*, statute unconstitutional insofar as it authorized the shooting).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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Attorneys for Petitioner

United States Court of Appeals
For the First Circuit

No. 00-2498

JEROME JARRETT,

Plaintiff-Appellee,

v.

TOWN OF YARMOUTH, GERARD BRITT,
CHERYL NUGENT GOMSEY, RICHARD WHITE,
Defendants,

PETER MCCLELLAND, ROBERT CHAPMAN
Defendants-Appellants.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, U.S. District Judge]

Before

Torruella, Circuit Judge,
Coffin, Senior Circuit Judge,
and Lipez, Circuit Judge.

Leonard H. Kesten, with whom Deidre Brennan Regan and Brody, Hardoon, Perkins & Kesten were on brief, for appellants Peter

McClelland and Robert Chapman.

Donald W. Cook, with whom Kathleen J. Wood was on brief, for appellee.

May 6, 2003

Per Curiam. On December 16, 1994, Jerome Jarrett fled the scene of a minor traffic accident and was subsequently apprehended by Shadow, a police dog controlled by Yarmouth Police Officer Peter McClelland. Shadow bit Jarrett at least twice on the leg in the course of corralling him before officers arrived to take the suspect into custody. Jarrett filed 42 U.S.C. § 1983 claims against Officer McClelland and Robert Chapman, the Yarmouth Chief of Police, [1] alleging that McClelland used excessive force in releasing Shadow, and that Chief Chapman "tolerated a pattern and practice of unjustified, unreasonable and excessive force regarding McClelland's use of a dog to attack and bite." Jarrett also brought suit against the Town of Yarmouth, seeking to hold the municipality liable under a *Monell* theory, see *Monell v. New York Dep't of Soc. Services*, 436 U.S. 658 (1978), for promulgating a dog apprehension policy that deprived him of his constitutional rights.

After a bifurcated trial, a jury returned verdicts against both Officer McClelland and Chief Chapman.[2] The defendants now contest the

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1. Jarrett also brought claims against Yarmouth police officers Gerard Britt, Cheryl Nugent Gomsey, and Richard White, but did not pursue these claims at trial.

2. The jury was not explicitly invited to issue a verdict with respect to the Town in either phase of the trial; indeed, neither the jury instructions nor the verdict forms expressly referenced the Town as a party. These omissions have created some dispute as to whether Jarrett properly preserved his municipal liability claim below. Close

I.

In the early morning hours of December 16, 1994, Yarmouth Police Officer Gerard Britt observed the defendant sitting in his car in a motel parking lot off of Route 28. Officer Britt then saw Jarrett quickly exit the motel parking lot and drive off in the opposite direction on Route 28. Britt radioed to fellow officer Richard White, and the two officers unobtrusively tracked Jarrett, who was driving in excess of sixty miles per hour. Several minutes later, Jarrett exited into another parking lot off of Route 28. Officer White followed Jarrett off the exit while Officer Britt continued up the road and entered the parking lot from the opposite end. The parties dispute what happened next. The appellants claim that Officer Britt, now driving toward Jarrett, activated his lights and signaled for Jarrett to stop. Yet Jarrett continued driving directly toward Britt, who swerved abruptly and narrowly avoided a collision. Jarrett insists that Britt never activated his lights and that there was no near-collision. Both parties agree, however, that Jarrett proceeded to drive into an adjoining parking lot, where he ran into a cement post. Jarrett then exited the vehicle, scaled a nearby fence, and fled into a residential neighborhood.

(footnote 2 cont'd)

scrutiny of the record reveals that Jarrett's counsel did preserve the Monell claim, anticipating that if jury verdicts against Chapman and/or McClelland were later reversed on grounds of qualified immunity notwithstanding the commission of a constitutional violation, Jarrett could still claim attorney's fees from the Town if it was implicated in the violation. However, for the reasons that follow, we find that Jarrett's municipal liability claim fails as a matter of law.

At this point, two additional Yarmouth police officers joined the chase. Officer Cheryl Nugent Gomsey had clocked Jarrett driving over the speed limit while being followed by Officers White and Britt on Route 28, and also observed him hit the cement post and escape over the fence. Officer McClelland, the K-9 officer for the Yarmouth Police, was also radioed to the scene by Officer White, who reported (mistakenly, as it turned out) that he recognized Jarrett as a suspect in a prior armed robbery. Officer Gomsey arrived at the scene shortly after Jarrett fled from the parking lot, and teamed with Officer McClelland and his dog Shadow to track and apprehend Jarrett.

After helping Shadow over the fence, Officer McClelland placed him on his customary 15-foot lead and followed closely behind as the dog tracked Jarrett. Officer Gomsey continued the pursuit at some distance behind McClelland and Shadow so as not to contaminate the scent. For approximately twenty minutes Shadow led the officers along a circuitous route through the residential neighborhood until McClelland spotted Jarrett standing in the middle of the road, approximately fifty yards away. Officer Gomsey had fallen too far behind to see McClelland, Shadow, or Jarrett, but she heard McClelland yell three times: "Stop, police, or I'll send the dog." McClelland testified that after he issued these warnings, Jarrett accelerated and disappeared around a corner. Only then, according to McClelland, did he release Shadow with instructions to locate Jarrett and hold him.

Shadow is trained to execute the "bite-and-hold" technique upon release, meaning that he will bite and maintain his hold upon a suspect until the handler orders him to let go. Accordingly, a suspect who struggles with a dog trained to bite and hold may be bitten several times if the dog loses his grip and is forced to re-establish his hold. Yet the undisputed evidence at trial indicated that the vast majority of jurisdictions within the United States employ

bite-and-hold policies. An alternative technique, not widely adopted, is the "circle and bark" method. A dog trained to circle and bark will circle his target, barking, until his handler arrives. The dog will bite only if the target then attempts to move outside the "circle".

Because Shadow was trained to bite and hold, Officer McClelland knew with a high probability that if Shadow was released, he would bite the fleeing suspect. In fact, within thirty seconds of his release, Shadow apprehended Jarrett by biting him on the leg. Shadow was only out of McClelland's sight for those thirty seconds; as soon as McClelland found Shadow he commanded him to release Jarrett, and Shadow complied. An ambulance arrived within five minutes and transported Jarrett to a hospital, where he received stitches for cuts on his lower right leg. For the next two weeks Jarrett received daily medical treatment for his injuries; one year after the incident he still complained of pain and an inability to stand.

Not surprisingly, Jarrett recounts a different version of events. At trial, he testified that after finishing his shift at work, he picked up a car that he had recently purchased. He claimed not to have noticed the police officers trailing him on Route 28, and further testified that he pulled off the road into the parking lot because he was experiencing brake problems and trying to find a place to slow down. Jarrett admitted seeing police lights shortly before hitting the cement post, but insisted that he never saw a police cruiser heading toward his car. According to Jarrett, he fled after hitting the cement post because "I was driving illegally for one. And I knew that . . . if I got arrested, I was going to end up going to jail." Indeed, the record indicates that prior to the events in question, a warrant for Jarrett's arrest was issued after he failed to appear at a surrender hearing on a separate matter. However, both parties agree that the police officers pursuing Jarrett on December 16 were not aware of this outstanding arrest warrant.

After jumping the fence, Jarrett testified that he slipped and fell down, at which point he heard someone yell "Stop." He rose to his feet, and again heard someone yell, "Stop, or I'll let the dog go." Jarrett claims that he stopped running and put his hands in the air. Soon thereafter, however, Shadow jumped on his back and bit him twice on the leg in response to verbal commands issued from someone Jarrett could not see. Jarrett was ultimately apprehended by officers McClelland and Gomsey and charged with several misdemeanor offenses: (1) operating a motor vehicle with a suspended license; (2) leaving the scene of an accident; (3) operating an uninsured motor vehicle; and (4) failing to stop for a police officer. He was also charged with several civil infractions: (1) operating an unregistered motor vehicle; (2) failing to yield at an intersection; (3) speeding; and (4) operating a motor vehicle with defective equipment.

II.

On December 11, 1997, Jarrett filed section 1983 claims against the Town of Yarmouth and five Yarmouth police officers in the District Court of Massachusetts. Jarrett's complaint alleged inter alia that Officer McClelland's act of releasing Shadow constituted excessive force in violation of the Fourth Amendment, characterizing Shadow as an "instrument of potentially deadly force." Jarrett sought compensatory and punitive damages from McClelland for his alleged use of excessive force, and punitive damages from Chief Chapman for tolerating a pattern and practice of excessive force by Officer McClelland.

The case proceeded to a jury trial, which the court divided into two phases. In the first phase of the trial, the jurors considered Jarrett's excessive force claim against Officer McClelland. They ultimately returned a verdict for Jarrett, finding by a preponderance of the evidence that "Officer Peter McClelland used excessive force on

Jerome Jarrett on 12/16/94." However, the jury only awarded Jarrett one dollar in compensatory damages and no punitive damages. Although, as noted above, the Town of Yarmouth was not mentioned in either the jury instructions or on the verdict form, the jury, unprompted, appended to their verdict a recommendation that "the Town of Yarmouth be required from this time forward to . . . . retrain current K-9 units to use the find and bark method."[3] Following the verdict, McClelland and Chapman moved for judgment as a matter of law, renewing the argument that they were entitled to qualified immunity.

The judge denied the motion, and the trial moved into its second phase, where the jury considered Jarrett's claim for punitive damages against Chief Chapman. After hearing the evidence, the jury completed the verdict form for Phase II. In response to the first question -- "Did defendant Peter McClelland act in accordance with the Town of Yarmouth (sic) policy and procedure when he released the dog on December 16, 1994?" -- the jury answered "Yes." As noted, the jury had earlier concluded in Phase I that Officer McClelland used excessive force in apprehending Jarrett on the night in question. See *supra*. These two findings, coupled with the jury's admonition that the Town should retrain its dogs to use the find and bark method, suggest that the jury found the Town of Yarmouth's bite-and-hold policy to be unconstitutional. The jury ultimately awarded Jarrett punitive damages in the amount of "all reasonable legal fees and expenses incurred by the plaintiff's attorney." The defense objected, and the court ordered the jury to attach a specific dollar amount to their verdict. After further deliberation, the jury came back with a figure of $50,000, and the trial court entered judgment for Jarrett in the amount of $1.00 for Phase I, and $50,000 for Phase II.

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3. Jarrett does not argue on appeal that the jury's "recommendation" alone imposes liability on the Town or has any other binding effect.

McClelland and Chapman subsequently filed post-trial motions for judgments as a matter of law, and, in the alternative, sought new trials under Federal Rule of Civil Procedure 50(b). The motions articulated two grounds for relief: 1) the two officers were entitled to qualified immunity, and 2) the evidence did not support the verdict in either phase of the trial. The district court denied these motions, and the defendants appealed.

III.

A. Jurisdiction

As a threshold matter, Jarrett argues that we lack jurisdiction to hear this appeal because the trial court failed to enter a final appealable judgment or order. Specifically, he points to the district court's failure to make any formal disposition of his claims against Officer Gomsey, Officer Britt, Officer White, and the Town of Yarmouth. According to the appellant: "in a multi-defendant case such as this one where an appeal is taken from an order or judgment disposing of claims against less than all defendants, the appeal is premature and must be dismissed."

Our jurisdiction is limited to "all final decisions of the district courts of the United States." *United States v. Leichter*, 160 F.3d 33, 35 (1st Cir. 1998) (quoting 28 U.S.C. § 1291) (emphasis added). We have previously observed that "[a] 'final decision' is ordinarily one which disposes of all the rights of all the parties to an action." *In re Licht & Semonoff*, 796 F.2d 564, 569 (1st Cir. 1986). On numerous occasions, however, the Supreme Court has stressed that § 1291 should be construed practically rather than technically. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981) (referring to "a tradition of giving § 1291 a practical rather than a technical construction"); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 486 (1975). Applying this pragmatic approach, at least two circuits have

concluded that a federal district court decision is appealable under section 1291 even if it does not formally dispose of claims that were abandoned at trial. See *Vaughan v. Mobil Oil*, 891 F.2d 1195, 1198 (5th Cir. 1990); *American Nat. Bank & Trust Co. of Chicago v. Bailey*, 750 F.2d 577, 580-81 (7th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985). The Fifth Circuit remarked in Vaughan that it was "inclined to fasten finality upon a judgment that reflects the intention of the judge to dispose of all the business before him or her." 891 F.2d at 1197. Hence, "[a]n order that effectively ends the litigation on the merits is an appealable final judgment even if the district court does not formally include judgment on a claim that has been abandoned." *Id.* at 1198 (citations omitted). Here, Jarrett does not contest that his claims against Gomsey, Britt, and White were abandoned below. Accordingly, the district court's failure to enter judgment for the three officers is a technical defect that does not undermine our appellate jurisdiction. *Firestone Tire*, 449 U.S. at 373.

Jarrett also claims, however, that the court failed to enter a verdict on Jarrett's municipal liability claim against the Town of Yarmouth. We disagree. The district court properly entered judgment against Officer McClelland and Chief Chapman, both of whom were sued in their individual and official capacities. Jarrett himself argues that "[w]hen an individual is sued in his official capacity, the lawsuit is in reality a claim against the entity." See *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 705 (1st Cir. 1993) ("An official capacity suit is, in reality, a suit against the governmental entity, not against the governmental actor."). As a general rule, therefore, a court entering judgment against municipal officers in their official capacities is entering judgment against the municipality as well. Superficially, however, the facts of this case present an additional complication. While Jarrett sued the officers in both their individual and official capacities, the jury's award of punitive damages in Phase II appears to resolve only Jarrett's claim against Chief Chapman in his

individual capacity. See *Biggs v. Meadows*, 66 F.3d 56, 61 (4th Cir. 1995) ("[An] indication that a suit has been brought against a state actor personally may be a request for . . . punitive damages, since such relief is unavailable in official capacity suits.").

Upon closer examination, the jury's award of punitive damages on the Phase II verdict form does not undermine the finality of the district court's decision with respect to the Town. The proceedings below clearly reflect Jarrett's intent to resolve the Monell municipal liability issue by soliciting the jury's response to question one on the Phase II verdict form: "Did Peter McClelland act in accordance with the Town of Yarmouth policy and procedure when he released the dog on December 16, 1994?" The second question on the Phase II verdict form -- "Has the plaintiff proved by a preponderance of the evidence that Chief Chapman permitted and tolerated a pattern and practice of unjustified, unreasonable and excessive force by Officer McClelland with respect to the latter's deployment of Shadow?" -- was then intended to resolve Chapman's liability in his individual capacity for faulty supervision, and the punitive damages awarded related only to Chapman in his individual capacity.

The jury's affirmative response to Question #1, coupled with its earlier finding in Phase I that Officer McClelland used excessive force to apprehend Jarrett, established a basis for imposing liability on the Town for promulgating an unconstitutional policy -- the precise disposition that Jarrett sought for his *Monell* claim. By entering judgment on both verdicts, the district court terminated litigation on the merits with respect to McClelland, Chapman and the Town, see *Vaughan*, 891 F.2d at 1198, thereby establishing a final, appealable decision. Accordingly, finding no merit in Jarrett's jurisdictional claims, we proceed to address the alleged constitutional violation.

B. The Alleged Constitutional Violation

1. The primacy of the constitutional question in the qualified immunity inquiry.

After the jury issued its verdict against Chief Chapman in Phase II of the bifurcated proceedings, McClelland and Chapman moved for judgment as a matter of law, arguing inter alia that the verdicts against them could not stand because the two officers were entitled to qualified immunity. The district court denied their motions, and McClelland and Chapman now argue on appeal that these rulings were in error. "A district court's denial of qualified immunity is a legal question that we review de novo." *Davis v. Rennie*, 264 F.3d 86, 113 (1st Cir. 2001). In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court offered the following general guidance to courts reviewing qualified immunity determinations: "A court required to rule upon the qualified immunity issue must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." Id. at 201.

2. Reconciling the jury verdicts.

Before addressing the merits of the constitutional question, we must establish the factual predicate for our inquiry by determining exactly what facts the jury found. As we observed in *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999): "When a qualified immunity defense is pressed after a jury verdict, the evidence must be construed in the light most hospitable to the party that prevailed at trial . . . [I]n such an exercise, deference should be accorded the jury's discernible resolution of disputed factual issues." *Id.* at 23 (internal citations omitted). After Phase I of the bifurcated trial, the jury determined that Officer McClelland used excessive force when he released

Shadow. However, this verdict is consistent with both versions of the facts set forth by the parties at trial. The verdict could have reflected the jury's belief that Officer McClelland ordered Shadow to bite and hold after Jarrett surrendered himself, in which case the appellant clearly suffered a constitutional injury. See *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994) ("[N]o particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control."). However, it is also plausible that the jury determined that Officer McClelland acted unreasonably, even while crediting his testimony that Jarrett disregarded McClelland's verbal warnings, thereby forcing the officer to release Shadow to apprehend a fleeing suspect. Under these circumstances, it is not clear that Jarrett's Fourth Amendment rights would have been violated.

In resolving this factual ambiguity, we note the jury's explicit finding in Phase II that Officer McClelland acted in accordance with the policies and procedures of the Town of Yarmouth when he released Shadow. Nothing in the record suggests that Yarmouth policies permit an officer to command a police dog to attack a suspect who has already surrendered. In fact, the relevant regulations, which the defendants introduced at trial, tightly circumscribe the situations in which police officers may use force:

> Non-deadly force[4] may be used by a police officer in the performance of his duty:

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4. The regulations define non-deadly force as "that degree of force which in the circumstance is neither likely nor intended to cause great bodily harm." By contrast, deadly force is narrowly defined as force "inflicted by firearms." (a)

a) when necessary to preserve the peace, prevent commission of offenses, or prevent suicide or self-inflicted injury; or

b) when necessary to overcome resistance to lawful arrests, searches and seizures, and to prevent escapes from custody; or

c) when in self-defense, or defense of another against unlawful violence to his person or property.

These regulations cannot be construed to sanction the use of any force against a suspect who has surrendered peacefully. Hence, no reasonable jury could accept Jarrett's version of the facts -- that he had already surrendered when Officer McClelland released Shadow -- and simultaneously conclude that McClelland acted in accordance with the policies and procedures of the Town of Yarmouth.

Notably, Officer McClelland also testified during Phase I of the proceedings that additional department regulations compelled police dog handlers to announce "Stop, police, or I'll release the dog" three times before releasing, and Officer Gomsey confirmed that this practice was "routine." Both officers further testified that McClelland in fact issued these warnings before releasing Shadow on the night in question. At trial, no witness contradicted the officers' testimony regarding the existence and vitality of these regulations. Thus, if the jury ultimately found that McClelland acted in accordance with Yarmouth policies and procedures, they must have implicitly found that he issued the proper verbal warnings to Jarrett before releasing Shadow.

In the end, we can safely attribute the following factual findings to the jury: 1) Officer McClelland issued three verbal warnings to Jarrett before releasing Shadow, and 2) at the time McClelland

released Shadow, Jarrett had not surrendered to the police, but was resisting arrest by fleeing. The jury nonetheless determined that the defendant's use of force was excessive under the circumstances. We must now consider whether this verdict can stand as a matter of law.

3. Officer McClelland's alleged use of excessive force.

"Where . . . the excessive force claim arises in the context of an arrest . . . of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person." *Graham v. Connor*, 490 U.S. 386, 394 (1989). The *Graham* Court established a balancing test for determining whether a particular exercise of force is constitutional: "Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (internal quotation marks omitted). Courts conducting this balancing exercise must undertake a fact-intensive inquiry that is highly sensitive to the circumstances of the particular case:

> Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application . . . its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id. (internal quotation marks and citations omitted). In reviewing the conduct of law enforcement officials, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* Because objective reasonableness is the touchstone of the excessive force inquiry, the constitutional and qualified immunity inquiries in this area are closely intertwined. See *Saucier*, 533 U.S. at 206. Hence, the decisions of courts that have previously addressed excessive force claims in the dog-biting context may be instructive even if these claims were ultimately resolved on qualified immunity grounds.

Before turning to the Graham balancing test, we digress briefly to resolve an issue that has been lurking in the background throughout this litigation -- namely, whether releasing a police dog trained to bite and hold constitutes a use of deadly force. The deadly/non-deadly distinction is significant in the Fourth Amendment context; under clearly established law, the use of deadly force is constitutional only if, at a minimum, a suspect poses an immediate threat to police officers or civilians. See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Here, it is undisputed that Jarrett did not pose such a threat. Accordingly, if the release of a police dog is an exercise of deadly force, Officer McClelland clearly violated Jarrett's Fourth Amendment Rights by releasing Shadow to apprehend the appellee as he was running away.

In the leading case of *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), the police released a dog into a building to apprehend a burglary suspect. The dog fatally wounded the suspect by biting him in the neck, and the administratrix of the decedent's estate filed a § 1983 action alleging that the police had used "unnecessary deadly force." Notwithstanding the fact that the decedent was killed by the police dog, the Sixth Circuit determined that "the use of a properly trained police dog to apprehend a felony suspect does not carry with

it a substantial risk of causing death or serious bodily harm." *Id.* at 912 (internal quotation marks and footnote omitted). The Ninth Circuit similarly concluded that the use of police dogs trained in the "bite and hold" technique generally does not constitute deadly force, absent some demonstration by the plaintiff "that properly trained police dogs are reasonably capable of causing death." *Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1997). Jarrett points us to no contrary authority indicating that the use of trained police dogs is considered deadly force under certain circumstances. In fact, he concedes that "[b]ecause none of plaintiff's witnesses testified that a police dog like McClelland's was deadly force, nor did plaintiff's counsel argue it to the jury, and because the trial court rejected plaintiff's deadly force instruction, the deadly force issue is irrelevant to this appeal."

Consequently, our constitutional inquiry is confined to the question of whether Officer McClelland exercised unreasonable non-deadly force in releasing Shadow to apprehend Jarrett. Taking into account the "jury's discernible resolution of disputed factual issues," *Iacobucci*, 193 F.3d at 23, we can deduce how the relevant events unfolded. As Officer McClelland was being radioed to the scene, he overheard Officer White's conjecture that Jarrett was a suspect in a prior armed robbery. McClelland arrived shortly after Jarrett's unsuccessful efforts to elude two police officers ended with him crashing his car into a cement post. Jarrett fled the scene of this minor traffic incident, leaping a fence and racing through an unlit residential neighborhood in the middle of the night to avoid arrest. Officer McClelland and Shadow finally located Jarrett after tracking him for approximately twenty minutes, and McClelland verbally warned him three times: "Stop, police, or I'll send the dog." At that point Jarrett fled around a corner, and McClelland released Shadow. In the ensuing thirty seconds, Shadow apprehended Jarrett and bit him twice on the leg before Officer McClelland arrived and commanded Shadow to release. McClelland immediately radioed for

an ambulance that arrived within five minutes to transport Jarrett to a hospital, and shortly thereafter the appellee received medical treatment for cuts to his lower right leg.

After finding these facts, the jurors determined that McClelland's application of the Town's bite-and-hold policy was unreasonable, apparently because they found the policy itself to be unconstitutional. Their indictment of the bite-and-hold policy, however, finds no support in the case law. In a 1994 dog-biting case factually similar to the case at bar, the Ninth Circuit noted that

> [w]hen the incident that led to the filing of this lawsuit occurred, the use of police dogs to search for and apprehend fleeing or concealed suspects constituted neither a new nor a unique policy. The practice was long-standing, widespread, and well-known. No decision of which we are aware intimated that a policy of using dogs to apprehend concealed suspects, even by biting and seizing them, was unlawful. At the time of the incident in question, the only reported case which had considered the constitutionality of such a policy had upheld that practice.

Chew v. Gates, 27 F.3d 1432, 1447 (9th Cir. 1994) (citing *Robinette*, 854 F.2d at 909). We are aware of no post-*Chew* decisions suggesting that bite-and-hold policies are unconstitutional per se. Indeed, four years after *Chew*, the Ninth Circuit reiterated in *Watkins v. City of Oakland*, 145 F.3d 1087 (9th Cir. 1998), that since Chew "there had no been no change in the law that would have alerted [the defendant] that his use of a police dog to search and bite was unconstitutional." *Id.* at 1092.

The jury thus had no basis to conclude that the Town of Yarmouth's

bite-and-hold policy was unconstitutional. Our determination that there is no record support for finding bite-and-hold policies unconstitutional on their face, however, still leaves open the question of whether the particular use of bite-and-hold force at issue here was excessive under the circumstances. Without excluding the importance of other factors, the *Graham* Court focused its reasonableness inquiry on three factors in particular: 1) whether the suspect is actively resisting arrest or attempting to evade arrest by flight, 2) whether the suspect poses an immediate threat to the safety of the officers or others, and 3) the severity of the crime at issue. *Graham*, 490 U.S. at 396. As discussed earlier, the jury must have concluded that Jarrett was "attempting to evade arrest by flight" when McClelland released Shadow. With regard to the second factor, McClelland could reasonably have concluded that Jarrett posed a threat to the safety of residents in the neighborhood where the chase occurred. Jarrett's behavior after the car accident was erratic, and tended to confirm Officer White's suspicion that Jarrett was a suspect in a prior armed robbery. McClelland could not discern whether Jarrett was armed given the limited visibility, or predict the lengths to which Jarrett would go to avoid arrest. The third *Graham* factor (the severity of the crime at issue) slightly undermines the objective reasonableness of McClelland's actions. At the time McClelland released Shadow, he knew with certainty only that Jarrett had committed several minor traffic infractions. However, this factor alone is not dispositive, see *Graham*, 490 U.S. at 396, and we note that at least one other court has upheld the reasonableness of police-dog bites where the victim was only suspected of misdemeanors, see *Matthews v. Jones*, 35 F.3d 1046, 1048 (6th Cir. 1994).

In the final analysis, after reviewing McClelland's actions without "the 20/20 vision of hindsight," *Graham*, 490 U.S. at 396, we simply do not find that McClelland's decision to release Shadow was an exercise of objectively unreasonable force under the circumstances.

Our legal conclusion that McClelland did not use excessive force to apprehend Jarrett is not inconsistent with the jury's determination after Phase I that Jarrett did use excessive force. As discussed earlier, it appears that the jury initially concluded that the Town of Yarmouth's bite-and-hold policy was unconstitutional, and reasoned that any application of that policy must be unconstitutional per se. Their reasoning was erroneous as a matter of law. We conclude after conducting the *Graham* balancing test that Officer McClelland's release of a dog trained to bite and hold did not violate Jarrett's Fourth Amendment rights as a matter of law.

Our determination that Jarrett suffered no constitutional injury is dispositive of his municipal liability claim against the Town of Yarmouth. As the Supreme Court observed in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986):

> [N]either *Monell* . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the [court] has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.

Id. at 799 (original emphasis). Consequently, Jarrett's municipal liability claim against the Town of Yarmouth must fail as a matter of law.

IV.

We conclude that Officer McClelland did not violate Jarrett's Fourth

Amendment rights by using excessive force to apprehend him on the night in question. In the absence of any constitutional violation, the verdicts against Officer McClelland, Chief Chapman and the Town of Yarmouth must be vacated. The decision of the district court is reversed, and this case is remanded for entry of judgment in favor of defendants McClelland, Chapman, and the Town of Yarmouth.

It is so ordered.

United States Court of Appeals
For the First Circuit

No. 00-2498

JEROME JARRETT,
Plaintiff, Appellee,

v.

TOWN OF YARMOUTH, GERARD BRITT,
CHERYL NUGENT GOMSEY, RICHARD WHITE,
Defendants,

PETER MCCLELLAND, ROBERT CHAPMAN,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Joseph L. Tauro, U.S. District Judge]

Before

Torruella, Circuit Judge,
Coffin, Senior Circuit Judge,
and Lipez, Circuit Judge.

Leonard H. Kesten, with whom Deidre Brennan Regan and Brody, Hardoon, Perkins & Kesten were on brief, for appellants Peter McClelland and Robert Chapman.

Donald W. Cook, with whom Kathleen J. Wood were on brief, for appellee.

TORRUELLA, Circuit Judge. On December 16, 1994, Officer Peter McClelland released his police dog, Shadow, which apprehended Jerome Jarrett by biting Jarrett's leg after Jarrett had fled from the scene of a minor traffic accident. Jarrett subsequently sued Officer McClelland and the Yarmouth Chief of Police, Robert Chapman, under 42 U.S.C. § 1983, alleging, inter alia, that Officer McClelland had used excessive force when he released Shadow and that Chief Chapman tolerated a policy which created a pattern of unconstitutional conduct by Yarmouth police officers and, specifically, Officer McClelland.[1] After a bifurcated trial, a jury returned verdicts in favor of Jarrett against both Officer McClelland and Chief Chapman. The defendants appeal the verdicts, raising a whole host of challenges. After careful review, we reverse the judgments on the grounds of qualified immunity.

I. Factual Background

In the early morning hours of December 16, 1994, Jerome Jarrett attracted the attention of a Yarmouth Police officer by sitting in his car in a motel parking lot off Route 28. That officer, Gerard Britt, decided to follow Jarrett after seeing Jarrett exit the motel parking lot and quickly head in the opposite direction on Route 28. Officer Britt also radioed to another Yarmouth police officer, Richard White, who Officer Britt knew was in the vicinity. Consequently, two Yarmouth police officers ended up following Jarrett. However, neither of the officers activated his lights nor tried to stop Jarrett. Officer Britt simply clocked Jarrett's speed as in excess of sixty miles per hour.

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1. Jarrett also sued three other police officers, Gerard Britt, Cheryl Nugent Gomsey, and Richard White, and the Town of Yarmouth ("Town").

After several minutes, Jarrett exited into another parking lot off Route 28. Officer White followed Jarrett into this parking lot while Officer Britt continued on Route 28, entering the parking lot from the opposite end. Now heading toward Jarrett's oncoming car, Officer Britt activated his lights. Jarrett did not stop. Rather, according to the testimony of Officers Britt and White, Jarrett and Officer Britt barely avoided colliding, and Officer Britt had to swerve abruptly. In contrast, Jarrett claimed that there was no near collision and that he never saw Officer Britt heading toward him. The parties agree, however, that Jarrett then continued into an adjoining parking lot where he hit a cement post. After hitting the post, Jarrett abandoned his car and fled, scaling a nearby fence.

At this point, there were two additional Yarmouth police officers in the vicinity: Officer Cheryl Nugent Gomsey and Officer Peter McClelland. Officer Gomsey had seen Jarrett driving quickly on Route 28, followed by the two officers in their marked patrol cars. She also saw Jarrett hit the post and run away. Officer McClelland had been attracted by radio communications made by Officers White and Britt, and he arrived shortly after Jarret had fled. In fact, Officer McClelland saw Jarrett hit the post and flee from a distance. One of the radio dispatches overheard by Officer McClelland was Officer White saying that he recognized the driver of the car, Jarrett, as a suspect in a prior armed robbery.

Armed with only the information that Jarrett was wanted for several misdemeanor violations and had possibly been involved in a prior armed robbery, Officers McClelland and Gomsey undertook to track and apprehend Jarrett. Officer McClelland, the K-9 officer for the Yarmouth Police, also took his dog, Shadow, to assist in finding Jarrett. Shadow, after being helped over the fence, was placed on his usual 15-foot lead. He then began tracking Jarrett with Officer McClelland running closely behind. Officer Gomsey jogged after them, keeping some distance behind so as to not contaminate the

track. The area through which Shadow led the officers was residential and the path circuitous. According to the testimony of Officer McClelland, after he had been running for slightly less than twenty minutes, he saw a man standing in the middle of the road, about fifty yards away. At this point, Officer Gomsey had fallen behind and could not see Officer McClelland, Shadow, or Jarrett. Officer McClelland testified that he shouted, three times, "Stop, police or I'll send the dog." Officer Gomsey confirmed, in her testimony, that Officer McClelland issued several verbal warnings, which is "normal [and] routine." After issuing these warnings, Officer McClelland testified that the suspect accelerated, disappearing around the corner. Only then, according to Officer McClelland, did he release Shadow with the directive to locate the suspect and hold him.

Shadow was trained under a "bite and hold" policy. This means that when he locates his target, Shadow will bite and maintain his hold until told to release. However, if the suspect struggles, the dog may lose his grip and rebite. This may cause the dog to bite several times, as it tries to maintain its hold. The uncontroverted evidence showed that "bite and hold" policies are the standard in the United States. An alternative, not widely adopted, is the "circle and bark" method. Under that training, a dog will circle his target, barking, until his handler arrives. If the target attempts to escape or begins to move, the dog will bite. Because Shadow was trained under the "bite and hold" method, Officer McClelland knew, when he released Shadow, that there was a high probability that the dog would bite the fleeing suspect.

After being released, Shadow followed the man and disappeared around the corner. According to Officer McClelland, Shadow was only out of his sight for thirty seconds, and when he found Shadow, Shadow had apprehended Jarrett by biting him on the leg. Officer McClelland then testified that he commanded Shadow to release

Jarrett, and Shadow did. After Shadow released, Officer McClelland handcuffed Jarrett and called for backup. An ambulance arrived within five minutes and transported Jarrett to the hospital where he received treatment, including several stitches, and was released.

Not surprisingly, Jarrett recounted a slightly different version of events. He testified that he had just picked up his car, recently purchased, after finishing his shift at work. As he drove through Yarmouth, he claims to have not noticed the police officers who were following him. Instead, he was having problems with his brakes and pulled into the parking lot to try to slow down. While in the parking lot, shortly before hitting the cement pole, Jarrett noticed the police lights, but he did not see a police cruiser heading toward his car at any point. After hitting the post, Jarrett decided to run away. He was afraid of being arrested because he was driving illegally and was on
probation.

Jarrett said that after he jumped the fence, he got up and began to run. Within five seconds, he heard someone yell, "Stop." He apparently had fallen down at that point, and as he got back up, Jarrett heard someone say, "Stop or I'll let the dog go." Jarrett testified that he then stopped, placing his hands in the air. Then, he felt a dog jump on his back. A command was issued, by an unseen person, in a foreign language, and the dog bit him on the leg, at least twice.

Based on the events of that evening, Jarrett was eventually charged with several misdemeanor offenses: (1) operating a motor vehicle with a suspended license; (2) leaving the scene of an accident; (3) operating an uninsured motor vehicle; and (4) failing to stop for a police officer. He was also charged with several civil infractions: (1) operating an unregistered motor vehicle; (2) failing to yield at an intersection; (3) speeding; and (4) operating a motor vehicle with

defective equipment.[2]

II. Procedural History

Jarrett originally filed his complaint in the District Court of Massachusetts alleging that Officer Peter McClelland used excessive force when he released Shadow, an "instrument of potentially deadly force." Jarrett also sued the Chief of the Yarmouth Police, Robert Chapman, for tolerating a pattern and practice of excessive force by Officer McClelland.[3]

After defendants' motion to dismiss on the grounds of qualified immunity was denied, the case proceeded to a bifurcated jury trial. In the first stage, the jury considered Jarrett's excessive force claim against Officer McClelland. They returned a verdict in favor of Jarrett, finding that Officer McClelland used excessive force. They awarded compensatory damages in the amount of one dollar and no punitive damages. Also, the jury, without being asked to do so, independently recommended that the Town of Yarmouth adopt a new standard for training its police dogs. Specifically, they recommended that "the Town of Yarmouth be required from this time forward to .... retrain current K-9 units and train all future K-9 units to use the find and bark method."[4]

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2. On the night of December 16, 1994, there was an outstanding warrant for Jarrett's arrest. There had been a surrender hearing for which he had not appeared. However, it is undisputed that none of the officers knew that there was an outstanding warrant for Jarrett's arrest when they were chasing him.

3. Jarrett also sued the Town of Yarmouth ("Town") and Officers White, Britt, and Gomsey. Eventually, the claims against these four defendants were dismissed.

4. While the jury independently added this proposal, the parties agree that the Town

After the jury returned this verdict, defendants-appellants filed a motion for judgment as a matter of law arguing that both Officer McClelland and Chief Chapman are entitled to qualified immunity. The district court denied this motion.

The trial then proceeded to its second phase, against Chief Chapman.[5] There, the jury found that Officer McClelland had acted in

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(footnote 4 con'td)

was not a defendant during the first phase of the trial. Therefore, the jury's admonishment has no binding effect and imposes no liability upon the Town.

5. The record certainly creates some confusion as to whether the Town was a defendant during the second phase of the trial or whether the Town had been dismissed. A colloquy that occurred before phase two began possibly led plaintiff to believe that the Town had been reinstated as a defendant, although it could only be subject to a possible attorney's fees award. In fact, the only relief sought in the second phase was punitive damages, and all the parties recognize that the Town is immune from such damages. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). At various points in the record, the court and the defendants specify that only Chief Chapman is a defendant during phase two because of the Town's immunity. Only the plaintiff tries to insert references to the Town as a defendant, although never specifying the relief sought from the Town.

This possible confusion, however, is not enough to actually make the Town a defendant. The record is clear that the Town was never identified, by the court, as a defendant. The jury instructions contain no reference to the Town as a defendant, and the verdict form specifies that Chief Chapman is the defendant without making any similar assertion about the Town. In regard to Chief Chapman, the verdict form asks:

accordance with the Town's policy and procedures when he released Shadow. The jury also found that Chief Chapman had "permitted and tolerated a pattern and practice of unjustified, unreasonable and excessive force by Officer Peter McClelland with respect to the latter's deployment of the dog, Shadow." After some confusion,[6] the jury awarded $50,000 in punitive damages to Jarrett.

(footnote 5 cont'd)

> Has the plaintiff proved by a preponderance of the evidence that the defendant, Robert Chapman, as Chief of the Yarmouth Police department, permitted and tolerated a pattern and practice of unjustified, unreasonable and excessive force by Officer Peter McClelland with respect to the latter's deployment of the dog, Shadow?

(Emphasis added). In marked contrast, the verdict form does not identify the Town as a defendant; it simply asks if Officer McClelland acted "in accordance with the Town of Yarmouth [sic] policy and procedure." Because neither the jury instructions nor the verdict form asked the jury to judge the Town's liability or award any damages against it, the Town cannot be considered a defendant. Jarrett did not object to these instructions and, thus, lost any right to complain. See Fed. R. Civ. P. 51 (establishing that failure to object to a jury instruction waives the right to appeal any error). Furthermore, these questions were placed before the jury not only without objection from plaintiff but at his behest. If plaintiff intended the town to be a defendant, he should have been more specific. *See Figueroa-Torres v. Toledo-Davila*, 232 F.3d 270, 272 (1st Cir. 2000) (holding that defendant who failed to object to verdict form that did not require jury to specify basis of liability waived right to complain).

6. The jury originally awarded plaintiff attorney's fees and expenses. After objection, the district court, finding that the jury had to award a specific monetary figure, sent the jury back to deliberate further.

After this second verdict, defendants-appellants filed another motion for judgment as a matter of law and a motion for a new trial, pursuant to Federal Rule of Civil Procedure 50(b). In support, defendants-appellants argued that the evidence did not support either verdict and, in the alternative, that both defendants are entitled to qualified immunity. The district court denied the motion, and defendants-appellants filed their notice of appeal.

III. Discussion

Defendants-appellants raise multiple issues before this Court. We begin with the most promising of their arguments, that the district court erred in denying their motions for judgment as a matter of law on the grounds of qualified immunity. (7)

We review the denial of a Rule 50(b) motion de novo. *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 9 (1st Cir. 1999). However, in conducting that review, we interpret the facts in the light most favorable to the verdict. *Sheek v. Asia Badger, Inc.*, 235 F.3d 687, 699 (1st Cir. 2000). We will not judge witnesses' credibility or evidence's weight. *Id.* at 700. We also will reconcile factual conflicts in favor of the verdict and uphold that verdict unless the evidence only supports one conclusion, that the verdict cannot stand. *Walton v. Nalco Chem. Co.*, 272 F.3d 13, 18 (1st Cir. 2001).

A. Reconciling the jury verdicts

This case presents a slightly different challenge because we must first determine what the jury found. When we are confronted with

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7. Because we hold that both defendants are entitled to the affirmative defense of qualified immunity, we find it unnecessary to address any of their other arguments, including the claim that the Town's "bite and hold" policy is unconstitutional.

potentially inconsistent jury verdicts, we must do our best to reconcile those verdicts. See *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963) (holding that "it is the duty of the courts to attempt to harmonize" jury verdicts); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59 & 364 (1962) (holding that while appellate courts should not redetermine facts found by a jury, it is their duty to view a jury's findings in a consistent manner); *cf. City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) (holding that in a bifurcated trial of an excessive force claim if a jury finds no constitutional violation by the individual police officer, the court will not proceed to consider the claim against the municipality or supervisor because to do so would be to invite inconsistent verdicts).

In the first stage of the trial, the jury found that Officer McClelland had used excessive force when he released Shadow, who subsequently bit Jarrett. There are two possible theories that could support the verdict. First, the jury could have believed Jarrett's story that he had clearly surrendered before Officer McClelland ordered Shadow to bite. No one disputes that, if this occurred, it is a violation of Jarrett's Fourth Amendment rights and no qualified immunity defense can be made. See *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994) ("[N]o particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control."). Second, the jury could have accepted appellants' version of events but found that Officer McClelland still acted unreasonably under the circumstances. Under this version, Officer McClelland released Shadow after issuing three verbal warnings and while Jarrett continued to flee. If this version is true, appellants argue that Officer McClelland is nevertheless protected by qualified immunity.

Normally, we would not have to resolve this dispute. We would just

view the verdict in the light most favorable to Jarrett, the prevailing party, and uphold the result. See *Walton*, 272 F.3d at 18. Here, however, we must reconcile the verdict against Officer McClelland with the verdict against Chief Chapman, and the interpretation supported by Jarrett's testimony cannot be attuned with the jury's verdict in the second part of the trial.

After finding that Officer McClelland acted with excessive force, the same jury explicitly found that Officer McClelland acted in accordance with the policies and procedures of the Town of Yarmouth when he released Shadow. There is no evidence in the record that Yarmouth policies allow an officer to order a dog to attack a suspect who has already surrendered. In fact, the only evidence in the record is precisely to the contrary. The police regulations, introduced at trial, clearly stipulate that force may only be used in specific situations:

> Non-deadly force may be used by a police officer in the performance of his duty:
>
> a. when necessary to preserve the peace, prevent commission of offenses, or prevent suicide or self-inflicted injury; or
>
> b. when necessary to overcome resistance to lawful arrests, searches and seizures, and to prevent escapes from custody; or
>
> c. when in self-defense, or defense of another against unlawful violence to his person or property.[8]

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8. The regulations define non-deadly force as "that degree of force which in the circumstance is neither likely nor intended to cause great bodily harm." In contrast, deadly force is defined specifically as "that inflicted by firearms."

No language in this regulation could possibly support a finding that it is the policy of the Yarmouth police to use any level of force against a suspect who has peacefully surrendered. No contrary regulations were introduced by plaintiff, and plaintiff did not argue that there was an unwritten policy of using force against such suspects. Therefore, no reasonable jury could have concluded both that Officer McClelland knew that Jarrett had surrendered when Shadow was released and that Officer McClelland acted in accordance with the policies and procedures of the Town of Yarmouth.

Furthermore, Officer McClelland explicitly testified that he was required to announce, "Stop, police or I'll release the dog," three times before releasing Shadow and that he did so before releasing Shadow to apprehend Jarrett. Officer Gomsey confirmed that it was "routine" to make such an announcement and that Officer McClelland had issued such a warning. The plaintiff introduced no evidence to suggest that Officer McClelland was not trained in such a way. In fact, plaintiff never contested that proper procedures required Officer McClelland to make this announcement. Therefore, because the jury found that Officer McClelland acted in accordance with the policies and procedures of the Town of Yarmouth, the jury must have also found that Officer McClelland verbally warned Jarrett before releasing Shadow. It is the only possible interpretation of the jury's finding, in light of the introduced evidence.[9]

Because the jury must have found that Officer McClelland did not know that Jarrett had surrendered and that Officer McClelland issued the required warnings before releasing Shadow, the jury must have found that the release of Shadow was still excessive force under the circumstances. In other words, the jury must have believed Officer

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9. The evidence is also uncontroverted that Officer McClelland issued a verbal warning. All of the witnesses recounted hearing a warning.

McClelland's story but still found that the force he used was unreasonable in light of the circumstances. We must then consider whether this verdict can stand as a matter of law.

B. Qualified Immunity for Officer McClelland

Officer McClelland raised the defense of qualified immunity before, during, and after the trial, and he renews that claim before us. Whether an officer is entitled to qualified immunity is a question of law, to be determined by the courts. *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 141 (1st Cir. 2001). We therefore review the question de novo. *Davis v. Rennie*, 264 F.3d 86, 113 (1st Cir. 2001). While courts normally determine whether qualified immunity is available prior to trial, there are cases where a jury needs to resolve crucial factual questions before a court can resolve the qualified immunity question. *Kelley v. LaForce*, 288 F.3d 1, 7 (1st Cir. 2002).

Qualified immunity is an affirmative defense for government officials in § 1983 suits which allege constitutional violations. The doctrine shields officials from civil damages liability so long as their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Practically, "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (internal quotation marks omitted).

To determine whether a government official is protected by qualified immunity, courts make two inquiries: (1) whether the plaintiff suffered a constitutional injury, *Wilson v. Layne*, 526 U.S. 603, 609 (1999), and (2) whether "an objectively reasonable official would

have believed that his conduct was lawful 'in light of clearly established law and the information that the official possessed at the time of his allegedly unlawful conduct,'" *Kelley*, 288 F.3d at 6 (quoting *McBride v. Taylor*, 924 F.2d 386, 389 (1st Cir. 1991)). *Accord Wilson*, 526 U.S. at 609.

Here, Jarrett alleged that Officer McClelland acted unreasonably when he released Shadow and that this release constituted excessive force. The Fourth Amendment protects against the use of excessive force in the course of arrests and investigatory stops. U.S. Const. amend. IV (protecting against "unreasonable" seizures); see also *Graham v. Connor*, 490 U.S. 386, 395 (1989) (holding that all claims of excessive force should be analyzed under the Fourth Amendment); *Aponte Matos v. Toledo Davila*, 135 F.3d 182, 191 (1st Cir. 1998) (same). The jury agreed and found that Officer McClelland acted with excessive force when he released Shadow, knowing only that Jarrett was wanted for minor traffic violations and may have been previously wanted in connection with an armed robbery. We assume, arguendo, that there is sufficient evidence to support this finding and that Jarrett suffered a constitutional injury.

However, "even state actors who commit constitutional violations may be entitled to qualified immunity," *Camilo-Robles v. Hoyos*, 151 F.3d 1, 6 (1st Cir. 1998), depending on whether they acted in an objectively reasonable manner under clearly established law, *Kelley*, 288 F.3d at 6. We then turn to the second part of the qualified immunity inquiry: whether a reasonable officer would have believed that releasing a trained police dog to apprehend Jarrett was lawful in light of both clearly established law and the particular circumstances of that night. See *Wilson*, 526 U.S. at 609; *Kelley*, 288 F.3d at 6. At the time that Officer McClelland released Shadow, in December 1994, several major cases had addressed the use of trained police dogs to apprehend suspects. We now turn to an examination of those cases to determine what a reasonable officer would have known on

the night in question.

We begin with an issue which has been lurking in the background, although appellee now disclaims any explicit attachment. The issue is whether the use of police dogs to apprehend suspects by biting them constitutes deadly force.[10] This is an important question because the Supreme Court has outlined specific rules governing the use of deadly force to seize suspects. See *Tennessee v. Garner*, 471 U.S. 1 (1985). At a minimum, Garner requires that a suspect pose an immediate threat before an officer can use deadly force. Id. at 11. Nothing in the record supports the conclusion that Jarrett posed an immediate threat to anyone. Under these circumstances and clearly established law, no reasonable officer would have believed deadly force was justified. Therefore, if a reasonable officer should have believed that releasing Shadow was deadly force, Officer McClelland is not entitled to qualified immunity.

One of the earliest, and most important, opinions regarding the use of police dogs addressed whether their deployment is deadly force. In *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), the police, in the course of investigating a suspected burglary, released a dog into a building, believing that their suspect was inside. *Id.* at 911. The police issued several verbal warnings and then set the dog free, with the command, "Find him." *Id.* When the dog found the suspect, the dog bit the suspect in the neck. *Id.* The victim quickly died from his wound. *Id.* The administratrix of the decedent's estate then brought suit under the Fourth Amendment and alleged the use of "unnecessary deadly force." *Id.* Despite the fact that a death resulted, the Sixth Circuit held that "the use of a properly trained police dog to apprehend a felony suspect does not carry with it a 'substantial

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10. Jarrett's original complaint alleged that Shadow is an "instrument of potentially deadly force." Jarrett also requested a deadly force instruction as part of the jury instructions.

risk of causing death or serious bodily harm.'" *Id.* at 912. Robinette thus established a baseline presumption that releases pursuant to general "bite and hold" policies are subject only to the rules governing the use of non-deadly force.

Subsequent cases have consistently followed this approach and held that the use of police dogs does not constitute deadly force. See *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998) (holding that the plaintiff failed to present evidence that the use of a trained police dog presents more than a remote possibility of death and therefore plaintiff was not entitled to a deadly force instruction); *cf. Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996) (holding that because the plaintiff suffered only non-life threatening injuries, did not require serious medical attention, and the dog released on command, he was not entitled to a deadly force instruction). Consequently, it is far from clearly established law that the use of trained police dogs to bite and detain suspects is deadly force, subject to the requirements of Garner, and no reasonable officer would have believed himself constrained by the rules governing the use of deadly force.

This, however, does not completely answer the question of whether a reasonable officer in December of 1994 would have known that releasing a dog pursuant to a general "bite and hold" policy, like the Town of Yarmouth's policy, is unconstitutional. We note first that there is no case that has held these policies to be unconstitutional. Only one case, decided by a district court, could be read to suggest that acting pursuant to such policies raises constitutional problems of which a reasonable officer should be aware. In *Marley v. City of Allentown*, 774 F. Supp. 343 (E.D. Pa. 1991), *aff'd* 961 F.2d 1567 (3d Cir. 1992), the court held that an officer who released his dog to apprehend a misdemeanor suspect acted in an objectively unreasonable manner under the Fourth Amendment. Id. at 345-46. However, the court also relied upon the fact that evidence suggested

that the suspect had visibly surrendered before the officer released the dog. *Id.* at 346. Therefore, it is hard to accord any particular significance to the decision in *Marley* because everyone agrees that siccing a dog upon a compliant suspect is a clear constitutional violation. *Mendoza*, 27 F.3d at 1362.

Furthermore, other courts have concluded that "bite and hold" policies are not contrary to clearly established law. In *Watkins v. City of Oakland*, 145 F.3d 1087 (9th Cir. 1998), the Ninth Circuit addressed an incident which occurred on November 20, 1993, slightly more than one year before the event of which Jarrett complains. There, the court determined that a "'bite and hold' policy did not violate clearly established law concerning the use of excessive force." *Id.* at 1092. Additionally, an officer acting in accordance with that policy would be entitled to qualified immunity. *Id.* In reaching this conclusion, the Ninth Circuit found that Marley failed to provide "sufficient notice" that acting under typical "bite and hold" policies could be unconstitutional. *Id.* at 1092 n.1.

Rather than finding releases pursuant to "bite and hold" policies to be constitutionally questionable, courts have principally worried about releases that did not comport with those policies. For example, in *Watkins*, the court denied summary judgment on the basis of qualified immunity because the plaintiff testified that the officer had allowed the dog to continue biting even after the plaintiff was fully compliant and no longer posed a threat. *Id.* at 1093. In *Vathekan v. Prince George's County*, 154 F.3d 173 (4th Cir. 1998), the Fourth Circuit concentrated on the issue of notice. *Id.* at 179. That case dealt with a truly horrific scenario where the police had released a dog into an occupied home, reasonably believing that a burglar might be lurking inside. *Id.* at 176. Instead of finding a burglar, the dog attacked the lawful resident who was asleep in her bed, crushing her skull. *Id.* at 177. The court denied summary judgment on the basis of qualified immunity because it found that there was a genuine issue

as to whether the officers had issued a verbal warning before releasing the dog. *Id.* at 180-81. Furthermore, the court held that, as of 1995, it was objectively unreasonable to release a police dog without first giving a verbal warning. *Id.* at 179. This decision, however, suggests that a release that follows a verbal warning would raise no constitutional problems.

There is, however, one way in which the instant case differs from *Robinette*, *Watkins*, and *Vathekan* and instead resembles *Marley*: Jarrett was only suspected of having committed misdemeanors and traffic violations, not any felonies. *Marley* certainly suggests that using a police dog to apprehend a "fleeing misdemeanant" is objectively unreasonable and, hence, unconstitutional. 774 F. Supp. at 345-46; *cf. Mendoza v. Block*, 27 F.3d 1357, 1362-63 (9th Cir. 1994) (emphasizing both the fact that the dog bite victim was wanted for a bank robbery, a felony, and the additional facts that the suspect was possibly armed and hiding on private property when holding that the officer acted in an objectively reasonable manner when he released his dog).[11] Furthermore, the Supreme Court has explicitly directed the courts to consider the severity of the crimes involved when evaluating excessive force claims. *Graham*, 490 U.S. at 396. Courts are supposed to look to "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or

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11. Jarrett also directs our attention to *Kerr v. City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989), which he claims supports the proposition that using dogs to apprehend misdemeanor suspects is unconstitutional. That case, however, dealt with three apprehensions where the officers had ordered their dogs to bite suspects without allowing the suspects to first surrender or after the suspects had actually surrendered. *Id.* at 1551-52. This is conduct that everyone agrees constitutes excessive force, whether the suspect is wanted for a felony or a misdemeanor. As such, its holding hardly supports a general claim that using police dogs against misdemeanor suspects may be constitutionally invalid.

others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*; *accord Gaudreault v. Municipality of Salem*, 923 F.2d 203, 205 (1st Cir. 1990) (per curiam). Therefore, it is clearly established law, and was so in December of 1994, that officers should consider the type of crime for which a suspect is wanted when deciding what level of force is appropriate. This, however, is hardly determinative. Graham and other cases make clear that the severity of the crime at issue is not the only fact of importance, rather it is to be weighed in light of other surrounding circumstances. *See, e.g., Graham*, 490 U.S. at 396.

Moreover, another influential Sixth Circuit case held that it was objectively reasonable to use a dog to apprehend a particular misdemeanor suspect. *Matthews v. Jones*, 35 F.3d 1046 (6th Cir. 1994). The facts of that case were actually very similar to the case at bar. In Matthews, a police officer attempted to stop a driver who was speeding and driving erratically. *Id.* at 1048. A car chase ensued which ended when the driver pulled into some woods and fled on foot. *Id.* Shortly thereafter, a K-9 unit arrived on the scene and began to track the fleeing driver. *Id.* The dog eventually signaled that he had found the target but did not bite. *Id.* The officers then ordered the driver to stay still. *Id.* The driver did not comply, and the dog bit him. *Id.* Based on these facts, the Sixth Circuit concluded that "there is no evidence whatever in this record which could support a claim that [the dog] was not used in an 'appropriate manner.'" *Id.* at 1051 (citing *Robinette*, 854 F.2d at 913). Therefore, the court concluded "that no reasonable jury could conclude that the use of the police dog to apprehend Matthews was not objectively reasonable." *Id.* at 1052.

Here, Officer McClelland knew that he was chasing Jarrett, who was wanted for several misdemeanor and traffic violations. This, however, was not all. Officer McClelland had overheard Officer White say that Jarrett had been a suspect in a prior armed robbery. Jarrett had fled from a seemingly inconsequential accident, a

suspicious reaction. Furthermore, Jarrett was fleeing through a residential neighborhood in the middle of the night. It was difficult to see, and Officer McClelland had no way of knowing whether Jarrett was armed or not. Under these circumstances, taking into account the disposition of prior cases, it was not clearly established that releasing Shadow would be excessive force. In fact, the situation was very similar to that addressed in *Matthews* where the Fourth Circuit held that releasing the dog was objectively reasonable. *Id.* Therefore, Officer McClelland is properly entitled to qualified immunity.[12]

C. Qualified Immunity for Chief Chapman

Chief Chapman also raised the affirmative defense of qualified immunity before the district court and reasserts that defense before us. Like individual officers, supervisors can also avail themselves of the protections of qualified immunity. *Camilo-Robles*, 151 F.3d at 5-6. In order for a supervisor to be held liable for the actions of a subordinate under § 1983, two conditions must be fulfilled: (1) the subordinate must have committed a constitutional violation, and (2) "it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context." Id. at 6. Again, we assume, arguendo, that Officer McClelland violated Jarrett's Fourth Amendment rights. Therefore, Chief Chapman can be held liable if his actions predictably led to Officer McClelland's use of excessive force, either by creating a

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12. It is important to note the limited nature of our holding. We do not declare that Officer McClelland acted in an objectively reasonable manner. In fact, we assume, arguendo, that the jury reached the correct conclusion when it found that Officer McClelland acted unreasonably. Rather, we find that he acted reasonably under clearly established law. *See Saucier v. Katz*, 533 U.S. 194 (2001) (emphasizing that the reasonableness prongs for excessive force and qualified immunity are distinct inquiries).

policy or being deliberately indifferent to possible constitutional violations by his subordinates. *Id.* at 6-7.

As discussed above, in December 1994, it was not clearly established that apprehension of suspects pursuant to "bite and hold" policies created constitutional problems. *See Watkins*, 145 F.3d at 1091. In fact, the Ninth Circuit had specifically held that, as of 1993, a chief of police was entitled to qualified immunity because there was no clearly established law against "bite and hold" policies. *Id.* at 1094 n.2.

The Ninth Circuit, a frequent arbiter of excessive force cases involving dog bites, has recognized that "bite and hold" is "neither a new nor a unique policy." *Chew*, 27 F.3d at 1447. In fact, training dogs in accordance with this policy is "long-standing, widespread, and well-known." *Id.* This decision, issued a mere four months prior to the night in question, found that Los Angeles' "bite and hold" policy did not violate the clearly established laws regarding both the training and deployment of police dogs. *Id.* at 1448. The court continued to find:

> [W]e simply do not believe that, given the historical facts and circumstances, the use of police dogs in the manner prescribed in the Los Angeles Police Department's policy is sufficiently similar to other uses of force held to be unconstitutional by the courts to put reasonable law enforcement officials on notice that the department's policy violated the Fourth Amendment.

Id. at 1450. The court relied upon that finding to conclude that the officers responsible for promulgating the "bite and hold" policy were entitled to qualified immunity. *Id.*

This, however, is only half of the *Chew* court's decision. The Ninth Circuit also reversed the grant of summary judgment in favor of the city and allowed the plaintiff to pursue his claim that the "bite and hold" policy, itself, was unconstitutional. *Id.* at 1439-40. The city, which cannot invoke the protections of qualified immunity, prevailed below by convincing the district court that this particular dog release was objectively reasonable. *Id.* at 1439. The Ninth Circuit concluded that there was a genuine issue of material fact as to whether the officer actually acted in accordance with city policy. *Id.* at 1440. While this theory does not implicate the general constitutionality of the policy, the court specifically allowed the plaintiff to proceed on the alternate theory that the policy was unconstitutional. *Id.* This decision, then, establishes that "bite and hold" policies are open to constitutional challenges. It does not, however, establish that they are unconstitutional. *Id.* at 1451.

While *Chew* allowed a constitutional challenge to a "bite and hold" policy to proceed, it can hardly be considered a clear statement alerting police supervisors that their "bite and hold" policies are unconstitutional. In fact, the *Chew* decision hardly changed the legal landscape; it just allowed a challenge to proceed. Additionally, the evidence presented in the case at bar only supports the conclusion that such policies continue to be the norm across the country. Therefore, we hold, that as of December 1994, the law was not clearly established that a supervisor could be held liable for the actions of an officer acting pursuant to a "bite and hold" policy and that as a result such a supervisor is entitled to qualified immunity.

This, however, does not determine the question as to Chief Chapman because Jarrett also alleged that the chief had failed to adequately train and supervise Officer McClelland. While a supervisor may indeed be held liable for failure to adequately train or supervise, see, e.g., *Aponte Matos*, 135 F.3d at 192 (noting that a supervisor may be held liable for failure to discipline a "miscreant officer"), Jarrett's

failure to train argument essentially boils down to a complaint with the "bite and hold" policy in Yarmouth. He does not allege that Officer McClelland was improperly trained under this policy. In fact, all the evidence supports the conclusion that Officer McClelland was exceptionally well-trained. The uncontradicted testimony was that Officer McClelland and Shadow were one of the highest-rated K-9 teams in the nation. They had even been recognized internationally. Rather than attacking the substantial training that Officer McClelland and Shadow received, Jarrett essentially alleges that Chief Chapman was deliberately indifferent because he allowed the "bite and hold" policy in Yarmouth to stand. This argument is no different than claiming that Chief Chapman is liable because he promulgated a "bite and hold" policy, and, as such, Chief Chapman is entitled to qualified immunity.

IV. Conclusion

Because both the defendants are entitled to qualified immunity, we reverse.

Reversed.

United States Court of Appeals

For the First Circuit

No. 00-2498

JEROME JARRETT,

Plaintiff, Appellee,

v.

TOWN OF YARMOUTH, GERARD BRITT,
CHERYL NUGENT GOMSEY, RICHARD WHITE,

Defendants,

PETER MCCLELLAND, ROBERT CHAPMAN,

Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, U.S. District Judge]

6/12/03 ORDER filed by Chief Judge Michael Boudin, Senior Judge Frank M. Coffin, Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, Judge Jeffrey R. Howard. The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc, It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied. [00-2498] (lina)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JEROME JARRETT

Plaintiff(s)

v. CIVIL ACTION NO. 97-12722-JLT

PETER McCLELLAND and ROBERT CHAPMAN

Defendant(s)

JUDGMENT IN A CIVIL CASE

TAURO, D.J.

X **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:
JUDGEMENT FOR THE PLAINTIFF: JEROME JARRETT

In the amount of $1.00 for Phase I (defendant McClelland) – and in the amount of $50,000 for Phase II (defendant Chapman).

TONY ANASTAS, CLERK

Dated: July 20, 2003 /S/ Rita Lorett

(By) Deputy Clerk

NOTE: The post judgment interest rate effective this date is 5.67%.

(2)

Supreme Court, U.S.
FILED
OCT 17 2003
OFFICE OF THE CLERK

No. 03-404

In the
Supreme Court of the United States
October Term 2003

JEROME JARRETT,

Petitioner,

v.

TOWN OF YARMOUTH, ROBERT CHAPMAN, AND PETER McCLELLAND,

Respondents.

Petition for a Writ of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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24 pp

QUESTIONS PRESENTED

1. Whether the First Circuit Court of Appeals correctly determined that the jury's indictment of the Town's bite-and-hold policy as being unconstitutional was without legal basis where there was no record support finding bite-and-hold policies unconstitutional on their face?

2. Whether the First Circuit Court of Appeals properly determined that there was no record support for finding a bite-and-hold policy unconstitutional on its face and examined instead whether the particular use of the bite-and-hold at issue was excessive and in violation of the Fourth Amendment?

3. Whether, after considering the jury's resolution of disputed factual issues and the balancing test of *Graham v. Connor*, 490 U.S. 386 (1989), the First Circuit correctly determined that the police officer's release of a police dog trained to bite-and-hold did not violate the petitioner's Fourth Amendment rights under the circumstances?

4. Whether the First Circuit properly confined its constitutional inquiry to whether the police officer exercised unreasonable non-deadly force in releasing the dog where the plaintiff produced no authority indicating that the use of trained police dogs was considered deadly force and where counsel conceded to the Court that the deadly force issue was irrelevant to the appeal?

LIST OF PARTIES

The petitioner states that there is no record disposition of the claims against Defendants Gerard Britt, Cheryl Nugent Gomsey, and Richard White. By way of clarification, the First Circuit Court of Appeals noted that the petitioner did not contest that his claims against these defendants were abandoned and that any failure to enter judgment for these officers did not undermine its appellate jurisdiction. *Jarrett v. Town of Yarmouth*, 331 F.3d 140, 144 (1st Cir. 2003), at Petition Appendix (" Pet. Apx.") A.

TABLE OF CONTENTS

PAGE

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 1

Reasons for Denying the Writ 10

Argument 10

Conclusion 18

TABLE OF AUTHORITIES

PAGE

CASES

Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994) 12

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865 (1989) 11, 15-16

Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999) 16

Kuha v. City of Minnetonka, 328 F.3d 427 (8th Cir. 2003).....15

Marley v. City of Allentown, 774 F.Supp. 343 (E.D. Pa. 1991), *aff'd mem.* 961 F.2d 1567 (3d Cir. 1992) 12

Monell v. New York Dep't. of Soc. Services, 436 U.S. 658, 98 S.Ct. 2018 (1978) 7, 8

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 75 S.Ct. 614 (1955) 10

Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988) 13

Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694 (1985) 13, 15

PAGE

Vera Cruz v. City of Escondido, 139 F.3d 659 (9th Cir. 1997) 13

Watkins v. City of Oakland, 145 F.3d 1087 (9th Cir. 1998) 12

Wilson v. Layne, 526 U.S. 603, 119 S.Ct. 1692 (1999) 18

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const., amend. IV ..... *passim*

STATUTES, RULES AND REGULATIONS

42 U.S.C. § 1983 7

Supreme Court Rule 10 10

STATEMENT OF THE CASE

I. Factual Background.

In the dark early morning hours of December 16, 1994, Officer Britt, a patrolman with the Town of Yarmouth ("Town"), observed an operator of a motor vehicle in a motel parking lot watch him as he proceeded past his car and then take off in the other direction at a high rate of speed. Officer Britt turned around and radioed Officer White, who was passing by, advising him of the situation.

Officer Britt saw the car head into another parking lot. Officer White made a dispateh over the radio that he recognized the car's operator as Jerome Jarrett, the petitioner, and that he was a suspect that had been involved in an armed robbery. Officer White activated his blue lights and headed into the parking lot. Officer Britt came into the lot from a different direction. The car proceeded through the lot, toward an exit onto another road. It approached Officer Britt's vehicle, and Officer Britt activated his blue lights, but the car did not stop. Officer Britt made a u-turn to the right to avoid the car, and he hit the curbing. Jarrett's car proceeded into another parking lot, where it struck a cement post. He then existed the vehicle, scaled a nearby fence, and fled into a residential neighborhood.

Two more police officers arrived. Officer Gomsey who had clocked the petitioner speeding and had observed him jump the fence and Officer McClelland, a patrolman with the department for some twenty years. He has been the K9 handler for the depart-

ment since 1981. His K9 partner was a dog named Shadow.

Officers Gomsey and White identified the person they were chasing as Jerome Jarrett. Officer White suspected that he had been involved in a prior armed robbery. Officer McClelland knew the name because of his involvement in an earlier track following an armed robbery at a gas station.[1] Officer McClelland started the track, teamed with Officer Gomsey who stayed some distance behind so as not to contaminate the scent. They went over a fence, and continued the track. Shadow was on a leash, with a 15 foot lead. Officer McClelland heard over his radio that the suspect's vehicle was unregistered and uninsured, and that its operator had a suspended license.

The neighborhood was one of many crossing streets, with a number of cottages and homes. It was a maze of houses and bushes and trees. After following Shadow on a circuitous route through the neighborhood Officer McClelland saw a flash or blur of something he thought was someone running in the darkness at the corner of a house. He ran to that location and saw the plaintiff in the middle of the road about fifty yards ahead, running. Officer McClelland gave three verbal warnings, which Officer Gomsey heard, to "stop, police or I'll send the dog." Jarrett looked back at him and accelerated his speed up the street. Only then did Officer McClelland release Shadow's leash. Some thirty sec-

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[1] Although he ended that earlier track without finding the suspect, Officer McClelland later found out Jarrett had been arrested and charged for it. RT 641-643.

onds later, Officer McClelland came around to the front of the house and saw Jarrett standing in the yard, and Shadow had a hold of him behind the knee. The track had lasted about eighteen minutes.

After determining Jarrett had no weapons, Officer McClelland called Shadow off. Shadow came back to his side. Jarrett got to the ground with his hands out on Officer McClelland's command. An ambulance arrived within five minutes and transported Jarrett to a hospital where he received stitches for cuts on his lower right leg.

Jarrett was issued citations for speeding, failing to yield, failing to stop for a police officer, leaving the scene of property damage, operating after suspension, operating unregistered, uninsured vehicle, and defective equipment.

Jarrett recounted a different version of events. He testified that, on December 16th, he left work in Hyannis at approximately 11:30 p.m. to pick up a car he had purchased in South Yarmouth. He did not remember the names of the car seller, how much he paid for it, nor the location where he picked it up from. The car was neither registered nor insured, and his license had been suspended. Jarrett admitted he put improper license plates on it that night.

Jarrett testified that he started having problems with his brakes on Route 28, and was trying to slow down. He testified that he did not see any police cruisers while on Route 28 until he had gone past one or two stop lights, and had turned into a parking lot to try to slow the car down. He glided into the lot and then proceeded into another lot. He testified

that he then noticed the police lights, just seconds before he hit the pole.

Jarrett admitted he ran from police, that he did so because he was driving illegally, and that if he got arrested, he was going to end up in jail. He was on probation and there had been a surrender hearing which he had not appeared for, and a warrant had issued.

According to Jarrett, he got up after jumping the fence and was starting to run when he heard someone yell "Stop." He fell and got up a second time and heard a voice say "stop or I'll let the dog go." Jarrett claims that he stopped running and put his hands in the air. He says that the dog was then ordered to bite him by someone he couldn't see. He said that the dog bit him on the leg, let go, and was ordered to bite him again. It was his position then that the dog had been sicced upon him after his surrender.

By the time of his closing in the first phase of the trial, against Officer McClelland, however, the plaintiff had abandoned his original version of facts regarding his surrendering, stating that it wasn't an issue in the case, and that his case "doesn't fall on whether or not you believe Jerome Jarrett stopped or didn't stop." RT 871. The theme of the closing was that the use of a trained bite-and-hold police dog was an instrument of force likely to cause serious injury or death, to be used only when the suspect presents an immediate and credible threat of serious bodily injury or death. RT 856-862, 875-876.

Jarrett asserts that the First Circuit's decision was "incorrect and misleading" in certain respects,

but none of those assertions bear out. For example, he says that the Court did not discuss or acknowledge that "by attacking and biting Mr. Jarrett the dog attack violated generally accepted law enforcement standards governing the use of physical force against suspects." Petition, p. 4. The Court, however, did address this argument, noting that the "undisputed evidence at trial indicated that the vast majority of jurisdictions within the United States employ bite-and-hold policies." It also noted that Jarrett:

> "pointed to no contrary authority indicating that the use of trained police dogs is considered deadly force under certain circumstances. In fact, he concedes that '[b]ecause none of plaintiff's witnesses testified that a police dog like McClelland's was deadly force, nor did plaintiff's counsel argue it to the jury, and because the trial court rejected the plaintiff's deadly force instruction, the deadly force issue [was] irrelevant to this appeal.' "

Pet. Apx. A-15, 16.[2]

Indeed, Richard Rogers, a former police dog handler and current police dog teacher, testified at trial that

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[2] The plaintiff also complains that the Court "omits mentioning that Yarmouth officers were also trained that '[f]orce likely to cause death or serious bodily injury' was deadly." Petition, p. 4. But, that definition was in terms of the Town's written policy which limited to firearms. Chief Chapman expressly testified that the use of a trained police dog did not fit into the written definition of deadly force which he gave to police officers. RT 996-997.

it was appropriate to begin a track in the circumstances described here, as well as to release Shadow. RT 589-591. Police dogs are taught the bite-and-hold technique. RT 586. The dog is taught that when he is told a command, he is to grab the suspect and restrain, and not release until commanded to do so. RT 586-587. This technique was prevalent in 1994, and is still. RT 587-588, 824.

The plaintiff's own expert, Vanness H. Bogardus III, confirmed that bite-and-hold is a standard and "[e]verybody that trains a police dog trains according to the same standard. We train according to it. Anyone who is training even a new dog today would be training according to that standard." RT 717-718. The other method — where the dog is expected to indicate to the handler the location of the person, not necessarily to attack — is the police dog standard of Germany. RT 706-707. This standard is different than the United States Police Canine Association ("USPCA"). RT 708. Mr. Bogardus also acknowledged that Shadow not only had performed satisfactorily in the USPCA activities, but that he had titles under European standards as well. RT 717. At all times pertinent, the bite-and-hold method was one accepted by the USPCA. RT 776-777.

Jarrett also complains that the First Circuit did not mention Chief Chapman's testimony regarding his oversight of dog handlers, which Jarrett characterizes as the Chief's knowledge that "when officers ... are not held accountable, constitutional violations occur." Petition, p. 6. The Court, however, had determined that Officer McClelland had committed no such constitutional violation in his release of

Shadow in the circumstances. Pet. Apx. A-19, 20.

II. Procedural Background.

In December, 1997, plaintiff Jerome Jarrett filed 42 U.S.C. § 1983 claims against the defendants Officer Peter McClelland and Police Chief Robert Chapman, alleging the use of excessive force in releasing Shadow and that the Chief "tolerated a pattern and practice of unjustified, unreasonable and excessive force regarding McClelland's use of a dog to attack and bite." [3] He also brought suit against the Town of Yarmouth, seeking to hold the municipality liable under the theory of *Monell v. New York Dep't. of Soc. Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978).

The case proceeded to a jury trial, which the court divided into two phases. In the first phase, the jurors considered Jarrett's excessive force claim against Officer McClelland. They ultimately returned a verdict for Jarrett, finding that Officer McClelland had used excessive force but awarding damages of only $1.00. Although the Town was not mentioned in either the jury instructions or the verdict form for this phase, the jury, unprompted, appended to their verdict a recommendation that "the Town of Yarmouth be required from this time forward to ... retrain current K-9 units to use the find and bark method."

Following the verdict, Officer McClelland and Chief Chapman moved for judgment as a matter of

[3] Jarrett also brought claims against Yarmouth police officers Gerard Britt, Cheryl Nugent, and Richard White, but did not pursue these claims at trial. Pet. Apx. A-2.

law, renewing their argument that they were entitled to qualified immunity. The court denied their motion, and the trial moved into its second phase, where the jury considered Jarrett's claim for punitive damages against Chief Chapman. After hearing the evidence, the jury completed the verdict form for this phase. In response to the first question — "Did defendants Peter McClelland act in accordance with Town of Yarmouth (sic) policy and procedure when he released the dog on December 16, 1994?" — the jury answered "Yes." The findings from the two phases, along with the jury's recommendation that the Town retrain its canine units under a different method, indicate that the jury found the Town's bite-and-hold policy to be unconstitutional. [4] Pet. Apx. A-17, 19.

The jury said it awarded punitive damages, but it did not state an amount. Instead, it stated the defendant was to pay for all reasonable legal fees and expenses incurred by the plaintiff's attorney. The court asked plaintiff's counsel the amount of her fees, indicating that he was going to ask the jury to place a number on it, which defendant argued was improper. The court then instructed the jury that they had to provide a dollar amount. The jury returned with the dollar amount of $50,000.

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[4] The jury was not explicitly invited to issue a verdict with respect to the Town in either phase of the trial. Neither the jury instructions nor the verdict forms expressly referenced the Town as a party. The First Circuit Court of Appeals concluded that Jarrett had nonetheless preserved his *Monell* claim against the Town and that by entering judgment on both verdicts, the district court terminated litigation on the merits with respect to McClelland, Chapman (both of whom were sued in their individual and official capacities) and the Town. Pet. Apx. A-3, 9-10.

Judgment entered thereafter, it being ordered and adjudged that judgment enter for the plaintiff in the amount of $1.00 for Phase I (defendant McClelland) and in the amount of $50,000 for Phase II (defendant Chapman).

The defendants moved for judgment as a matter of law, or for a new trial, arguing that plaintiff had failed to produce sufficient evidence to support the findings in his favor on any claims, and that the two officers were entitled to qualified immunity. The court denied the post-trial motion and the defendants appealed.

The First Circuit Court of Appeals in a decision dated October 25, 2002, reversed the judgments on grounds of qualified immunity. Pet. Apx. B-2. After careful review, that Court attributed the following factual findings to the jury: 1) Officer McClelland issued three verbal warnings to Jarrett before releasing Shadow, and 2) at the time McClelland released Shadow, Jarrett had not surrendered to the police, but was resisting arrest by fleeing.

Jarrett petitioned for rehearing, arguing *inter alia* that the Court lacked jurisdiction because the judgment only disposed of claims against Officer McClelland and Chief Chapman and not the other defendants, that the Town was not entitled to qualified immunity, and that the Court misconstrued his claim against the Chief inasmuch as he wasn't arguing a deadly force issue.

In March 2003, the First Circuit granted the request for rehearing, denied the request for rehearing en banc, and withdrew its opinion. In May, 2003,

the First Circuit issued a decision, attributing the same factual findings to the jury and ruling that it had jurisdiction over the appeal and that Jarrett had suffered no constitutional injury. Accordingly, it vacated the judgments against the defendants.

In June, 2003, the First Circuit denied the plaintiff's petition for rehearing and the suggestion for the holding of a rehearing en banc. Pet. Apx. C-1.

REASONS FOR DENYING THE WRIT

According to Supreme Court Rule 10, a petition for writ of certiorari will be granted only when there exists "special and important" reasons therefor as, for example, when a United States Court of Appeals has rendered a decision in conflict with that of another United States Court of Appeals on the same matter or has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision."

Also, as indicated by the requirements of Rule 10, certiorari is granted only in cases involving principles the settlement of which is important to the public as opposed to the parties. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S.Ct. 614 (1955).

The petition here presents no issue meriting exercise of this Court's certiorari jurisdiction. Much of the petition rests on a mischaracterization of the First Circuit's decision. For example, contrary to the petitioner's assertion, there is no conflict among the

circuits as to whether a police officer who uses a trained police dog escapes Fourth Amendment scrutiny on a claim of excessive force. The First Circuit applied such scrutiny in the case before it.

Likewise, the petitioner has not identified any "special and important" reasons warranting this Court's review. Rather, what he is complaining of simply is that the First Circuit failed to find in his favor.

1. There is No Conflict Among the Circuits.

The petitioner states that the First Circuit has determined that a police dog attack pursuant to a municipal policy of "bite-and-hold cannot constitute excessive force..." and that police officers who "let a dog inflict the injury pursuant to" such policy thus escape Fourth Amendment scrutiny in the First Circuit. Petition, p. 11. This assertion mischaracterizes the Court's holding. In fact, the First Circuit had stated that it was aware of no decisions "suggesting that bite-and-hold policies are unconstitutional per se" and that "there is no record support for finding bite-and-hold policies unconstitutional on their face ...." Pet. Apx. A-17, 18. It further stated that such determination nonetheless "still leaves open the question of whether the particular use of bite-and-hold force at issue here was excessive under the circumstances." Pet. Apx. A-18. It then did, contrary to petitioner's assertion otherwise, scrutinize Jarrett's claim under the *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865 (1989), standard and properly conclude that Officer McClelland's release of the dog did not violate Jarrett's Fourth Amendment rights. The "nation" thus does know

that Fourth Amendment rules do apply to officers who use police dogs. Petition, p. 12.

Given it is based on a mischaracterization of the First Circuit's ruling, Jarrett's claim of a conflict in the circuits falls flat. Jarrett asserts that the decision "contradicts that reached by the Ninth Circuit in *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994)," but the First Circuit actually relied upon *Chew* as support and stated in part:

> "[w]e are aware of no post-*Chew* decisions suggesting that bite-and-hold policies are unconstitutional per se. Indeed, four years after *Chew*, the Ninth Circuit reiterated in *Watkins v. City of Oakland*, 145 F.3d 1087 (9th Cir. 1998) that since *Chew* 'there had been no change in the law that would have alerted [the defendant] that his use of a police dog to search and bite was unconstitutional.' "

Pet. Apx. A-17.

Jarrett also cites to the federal district court case of *Marley v. City of Allentown*, 774 F.Supp. 343, 346 (E.D.Pa. 1991) *aff'd mem.*, 961 F.2d 1567 (3d Cir. 1992) as being in conflict with the First Circuit's decision. In *Marley*, the court denied the defendant's motion for judgment as a matter of law because the release of a police dog to attack an unarmed suspect who "possibly" had stopped fleeing "may be objectively unreasonable." The First Circuit, however, agreed that excessive force has been used if a police officer sics a dog on a person who is surrendered and under control. Pet. Apx. A-12. There is no conflict on this point.

Petitioner's claim of a conflict among the circuits is erroneous and thus does not provide a basis warranting the grant of the petition.

II. Review is Not Necessary to Determine Whether *Tennessee v. Garner* is Limited to Firearms.

No federal appeals court has held that a properly trained police dog is an instrument of deadly force and several have expressly concluded otherwise. The First Circuit noted this point in its decision:

> "In the leading case of *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), the police released a dog into a building to apprehend a burglary suspect. The dog fatally wounded the suspect by biting him in the neck, and the administratrix of the decedent's estate filed a § 1983 action alleging that the police had used 'unnecessary deadly force.' Notwithstanding the fact that the decedent was killed by the police dog, the Sixth Circuit determined that 'the use of a properly trained police dog to apprehend a felony suspect does not carry with it a substantial risk of causing death or serious bodily harm.' *Id.* at 912 (internal quotation marks and footnote omitted). The Ninth Circuit similarly concluded that the use of police dogs trained in the 'bite-and-hold' technique generally does not constitute deadly force, absent some demonstration by the plaintiff 'that properly trained police dogs are reasonably capable of causing death.' *Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1997). Jarrett points us to no contrary authority indicating that the use of trained police dogs is

> considered deadly force under certain circumstances. *In fact, he concedes that '[b]ecause none of plaintiff's witnesses testified that a police dog like McClelland's was deadly force, nor did plaintiff's counsel argue it to the jury, and because the trial court rejected plaintiff's deadly force instruction, the deadly force issue is irrelevant to this appeal.'*
>
> "Consequently, our constitutional inquiry is confined to the question of whether Officer McClelland exercised unreasonable non-deadly force in releasing Shadow to apprehend Jarrett."

Pet. Apx. A-15, 16 (emphasis added).

Despite having represented to the First Circuit that the issue was irrelevant, Jarrett now identifies a deadly force issue as warranting this Court's review. Petition, p. 13. It does not.

As noted, there is no conflict in the circuits on the issue whether the use of trained police dogs constitutes deadly force, and Jarrett cited no authority to the First Circuit or to this Court holding that they do constitute deadly force. [5] There is, therefore, no need for this Court to define what is meant by "deadly

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[5] The petitioner cites to criminal cases in which a defendant has used a dog to attack or to threaten injury to suggest that the use of a dog is "deadly," but reliance upon those cases is inapposite. Petition, n. 3. Apart from the fact that Jarrett never raised this argument to the courts below and cannot now, the fact remains that those cases involve criminal conduct and specific criminal statutes — which clearly do not apply to and are in no way analogous to a police officer's use of a trained police dog to apprehend a fleeing suspect. Petitioner is clearly reaching.

force" in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985), as Jarrett argues. Petition, p. 13. Similarly, that there may exist a conflict in the circuits as to whether the Model Penal Code ("MPC") definition of deadly force applies to a Fourth Amendment analysis is not relevant to any review of this decision. In any event, it is noteworthy that the ultimate conclusion has remained the same in these circuits — the use of a properly trained police dog in the course of apprehending a suspect does not constitute deadly force. *Kuha v. City of Minnetonka*, 328 F.3d 427, 435 n.3 (8th Cir. 2003).

Rather, review of excessive force claims involving police dogs properly have been governed by the general standard established in *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871 (1989), where this Court made "explicit what was implicit in *Garner's* analysis," and held that "all claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard...." According to *Graham*, 490 U.S. at 396-297, the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, and its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

The First Circuit analyzed the claim under the *Graham* standard and concluded that no Fourth Amendment violation had occurred. The decision in no way tells law enforcement to "abandon its reasonable methodology" nor "threatens the well-accepted law enforcement approach" toward weapons, as petitioner suggests. Petition, p. 14.

III. The First Circuit Court of Appeals Did Not "Overturn a Jury's Resolution of the *Graham* Factors."

The petitioner's suggestion that the First Circuit somehow disturbed the jury's resolution of the *Graham* factors is meritless. In fact, it is the petitioner who is ignoring the jury's resolution.

Contrary to Jarrett's assertions, the First Circuit expressly acknowledged that when a qualified immunity defense is pressed after jury verdict, deference should be accorded the jury's discernible resolution of disputed factual issues. Apx. A-11, citing *Iacobucci v. Boulter*, 193 F.3d 14, 23 (1st Cir. 1999). It specifically took "into account the 'jury's discernible resolution of disputed factual issues ....' " Pet. Apx. A-16. It noted that the jury had determined in Phase I that Officer McClelland used excessive force when he released Shadow. In Phase II, however, the jury found that he had acted in accordance with the policies and procedures of the Town when he released Shadow. Pet. Apx. A-11, 12. Nothing in the record suggested that the town's policies permitted an officer to command a dog to attack a suspect who had already surrendered. After careful review and consideration, the Court determined

it could "safely attribute the following factual findings to the jury: 1) Officer McClelland issued three verbal warnings to Jarrett before releasing Shadow and 2) at the time McClelland released Shadow, Jarrett had not surrendered to the police, but was resisting arrest by fleeing." Pet. Apx. A-13, 14.

It then applied and considered those findings in analyzing the *Graham* factors. Pet. Apx. A-17, 18. Notably, *Graham* also explicitly recognizes, and allows for, a measure of deference to officer judgment given the "tense, uncertain, and rapidly evolving circumstances that officers often confront." *Graham*, 490 U.S. at 396-397, 109 S.Ct. 865. Upon consideration and review of the jury's findings and the *Graham* factors, the Court properly concluded that Officer McClelland had not violated Jarrett's Fourth Amendment rights. Clearly, review is not necessary to address the "overturning" of a jury's resolution.

IV. Review is Not Warranted To Determine the Role Department Policy Plays in Finding a Constitutional Violation.

The petitioner again mischaracterizes the First Circuit's holding in arguing for this Court's review. As discussed, the Court did not find there was no constitutional violation simply because Officer McClelland "followed a widely practiced police policy". Petition, p. 17. The petitioner again ignores the fact that the Court specifically and carefully considered whether the particular use of the bite-and-hold force at issue was excessive pursuant to the *Graham* Fourth Amendment analysis. It was based upon that review that the Court determined there was no

constitutional violation. The panel thus in no way "diluted the Fourth Amendment's 'objective reasonableness'." Petition, p. 17. Rather, it confirmed that conduct must be determined to be objectively reasonable under the Fourth Amendment.

As such, contrary to the petitioner's assertion, this case does not warrant this Court's review "to determine the role department policy plays in determining a constitutional violation." Petition, p. 16. In any event, the petitioner's cite to this Court's decision in *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692 (1999), is inapposite inasmuch as that decision stated that "a policy ... could not make reasonable a belief that was contrary to a decided body of case law." The bite-and-hold policy is not contrary to a decided body of law.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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